SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 33

ORLANDO DELLI PAOLI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinions of the Court of Appeals are reported at 229 F. 2d 319.

Jurisdiction

The judgment of the Court of Appeals was entered January 10, 1956. The petition for a writ of certiorari was filed on February 3, 1956 (No. 664, October Term, 1955), and was granted March 26, 1956 (350 U.S. 992). A motion by petitioner for leave to proceed further *in forma pauperis* was

granted by this Court on May 14, 1956.[1] The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). See also Rules 37(b) (2) and 45(a), Federal Rules of Criminal Procedure.

Questions Presented

Whether the evidence adduced on the trial was sufficient to convict petitioner of the crime of conspiracy to violate the alcohol tax laws and whether the receipt in evidence of the post-conspiracy written confession of a co-defendant as against petitioner was proper.

Statutes Involved

The statutes involved in this case are Title 18, United States Code (1952 ed.), Section 371; Title 26, United States Code (1952 ed.) Sections 2803(a), 2806(e) and 2913. Only Title 18, United States Code, Section 371 is pertinent to this cause and reads as follows:

Conspiracy to commit offense or to defraud the United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the objects of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. * * * Act of June 25, 1948, c. 645, 62 Stat. 701.

Statement

Petitioner, Orlando Delli Paoli, and four co-defendants, Tony Pierro, Carmine Margiasso, Julius King and James

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[1] By direction of the Court, the Record on Appeal is not printed and this cause is heard on the typewritten record of the Court of Appeals. All page references are to the pages in the certified typewritten record.

Whitley, were named as defendants in an indictment in three counts, charging the following crimes: Count One: As to all defendants, a conspiracy in violation of Title 18, United States Code, Section 371, to violate the alcohol tax laws; Count Two: As to Margiasso and King, possession of a quantity of illicit alcohol, in violation of Title 26, United States Code, Sections 2803(a), (g); Count Three: Asto Margiasso alone, possession of another quantity of illicit alcohol, in violation of the same statutory provisions as in Count Two.

The conspiracy count in which petitioner Delli Paoli was named alleged a criminal conspiracy to violate the alcohol tax laws commencing on or about December 1, 1949 and continuing thereafter up to the date of the filing of the indictment on November 4, 1953. However, the defendants named in the indictment were apprehended by agents of the Treasury Department, Alcohol and Tobacco Tax Unit, on December 28, 1951, the date of the last overt act pleaded in the indictment, and there is no dispute as to the fact that the conspiracy charged in the indictment terminated on December 28, 1951.

All defendants were convicted of all counts in which they were named on November 26, 1954, in the United States District Court for the Southern District of New York, and received various sentences. Petitioner Delli Paoli was sentenced to a term of two years imprisonment for conspiracy to violate the alcohol tax laws, and he alone appealed the judgment of conviction. On appeal the Court of Appeals for the Second Circuit affirmed the judgment of conviction by a divided court and each of the three judges wrote an opinion. Judge Learned Hand wrote the opinion of the Court; Judge Medina concurred in a separte opinion; and Judge Frank dissented in an opinion.

The evidence in this case discloses that commencing

about December 7, 1949 until December 28, 1951, the date of the arrests, petitioner Delli Paoli and co-defendants Pierro and Margiasso were under surveillance by agents of the Treasury Department, Alcohol and Tobacco Tax Unit.

During December 1949 one Krone, the owner of a house and garage at 1124 Harding Park, in the Bronx, New York, met Pierro in the Tivoli Bar and Grill in the neighborhood and told him that he wanted to sell his home and move (78-83). Pierro and Delli Paoli, both of whom Krone knew from this neighborhood bar (74-75), inspected the property and eventually Pierro's sister, Mrs. Tillie Stasio (113), purchased the property on December 29, 1949 (89, 113). This property was located near the Long Island Sound and often experienced severe weather conditions (101, 117-118); and since the garage had no foundation it sometimes flooded in gale weather (101). Krone himself had built this garage (94) and it was in need of repairs after Pierro's sister purchased the property (100, 102). In the Spring of 1950 Pierro and another man were observed by Government agents to be repairing the garage (33).

On April 10, 1950 Pierro was observed to drive his automobile to Delli Paoli's home at 1155 Croes Avenue, Bronx, New York, where he joined Delli Paoli and together they drove to another place to inspect a green paneled truck (32-33). On April 12, 1950 this truck was observed to be standing in front of 1124 Harding Park (33). On May 1, 1950 the agents observed Pierro drive his automobile to Delli Paoli's home and together they drove to 1124 Harding Park, pick up the truck and then drive it to a gasoline service station where they purchased gasoline for the truck, then drive it back to the Harding Park address (34-35).

During the summer of 1951 a Mrs. DePasquale, who resided at 1124 Harding Park, introduced Delli Paoli to a

neighbor as her cousin (539-540). Delli Paoli was also seen at this address during this summer (552).

A more intensive surveillance of petitioner Delli Paoli and co-defendant Margiasso was commenced by the Government agents on or about October 22, 1951. After several inconclusive observations during November 1951, on December 4, 1951 Delli Paoli was observed to leave his home at 1155 Croes Avenue at about 3 P.M., enter his 1947 Cadillac car and drive to 1124 Harding Park where he put his automobile towards the garage doors and he was then observed to back the vehicle up to the garage doors and open them (143-144). The agent testified that at that precise moment, without observing more, he discontinued his observations and left the vicinity (144).

On December 10, 1951, Delli Paoli and Margiasso were observed to drive from Delli Paoli's home at 1155 Croes Avenue to 1124 Harding Park in the green paneled truck and there take some furniture from the truck and place it in the garage. They then returned the truck to a lot across the street from Delli Paoli's home (147).

On December 18, 1951 Delli Paoli was observed to be at the Bronx River Service Station located at Bruckner Boulevard and Bronx River Avenue in the Bronx, New York.[2] He left there and returned to his home (590-591). Margiasso was observed to arrive at 1124 Harding Park at about 6:30 P.M., to open the garage doors and enter the garage (150). At about 8 P.M. Margiasso drove to the Bruckner Boulevard service station where he entered the office (150). After 8:30 P.M. Delli Paoli left his home, drove to and entered the office of the service station (591). Shortly thereafter two men drove into the service station and entered the office. Margiasso emerged from the office, got into the two men's Pontiac and drove off, returning in about

[2] This service station is one of the important locations in this case.

half an hour (151). The Pontiac's "rear end was down" (401) and it appeared to be "heavily loaded." This vehicle was driven away by the unknown men and nothing more has ever been heard of it, for although the vehicle was followed it was not stopped because there were "icy roads" that night (400).

Meanwhile Delli Paoli was observed to go from the Bruckner Boulevard service station to the Tivoli Bar (594-595). From there he went to another bar, the Lido, where a man removed a large package from his Cadillac car and carried it into the bar (595-596). Later that night both Delli Paoli's and Margiasso's automobiles were observed parked at the Tivoli Bar (597).

On December 28, 1951, the critical date in this case, Government agents were observing the Bruckner Boulevard service station through field glasses from a distance (159). They observed the service station at some time between 7 and 8 P.M. (159). Delli Paoli and Margiasso were seen at the service station office (653). Then Delli Paoli drove off in his vehicle (654). Some time later co-defendant King drove into the service station where he was met by Margiasso (599-601). Margiasso got into King's car and drove off in it (601). While Margiasso was away, Delli Paoli returned and his Cadillac car was placed on the greasing pit by the service station attendant (159-161). King and Delli Paoli then sat first in Margiasso's car and later they went into the office of the service station. After the greasing job was completed and Delli Paoli's car was taken off the rack, both he and King sat in this vehicle until Margiasso returned with King's vehicle (160). During all of this time other persons, who have not been identified or connected with this case, were observed to be at or near the service station, as well as in the office itself (293); and the normal business routine of the service sta-

tion continued. At about 8:30 P.M., Margiasso returned with King's car and King drove off in it (161).

The agents followed King from Bruckner Boulevard and Bronx River Avenue in the Bronx to 7th Avenue and West 146th Street in Manhattan, a distance of approximately six miles of heavily trafficked streets, where they apprehended King and found a quantity of illicit alcohol in his vehicle. King was placed under arrest (161-163). During this time both Delli Paoli and Margiasso had each left the service station and neither was under observation by the agents for several hours.

The agents returned to Bruckner Boulevard and at about 10 P.M. they observed Margiasso return to the service station (409). Co-defendant Whitley arrived in his own car shortly thereafter and Margiasso drove off in Whitley's car, leaving Whitley at the service station (409). The agents followed Margiasso to 1124 Harding Park (410). Margiasso was observed to back Whitley's car up to the garage doors, to open the trunk of the car and then to open the garage doors. He then closed the trunk of the car, left the garage doors open and drove off. The agents stopped Margiasso but found no alcohol in Whitley's car (410-411). Keys found on Margiasso's person fitted the lock on the garage doors of 1124 Harding Park and upon returning to the garage (where the doors were open) a large quantity of illicit alcohol was found in the garage (170-172). Margiasso was placed under arrest and taken back to Bruckner Boulevard. Whitley too was then placed under arrest and he was found to have $1,000 in cash in a brown paper bag on his person (179-180).

At about 11:30 P.M. that night Delli Paoli returned to Bruckner Boulevard and drove into the service station (180). Agent Fay engaged him in conversation and after a few moments Delli Paoli started to back out of the station (180-

181, 414-415). Agent Murphy then drove his car up behind Delli Paoli and blocked his path (415). Meanwhile a police car pulled up to his left (181). Delli Paoli thereupon was arrested.[3]

On January 5, 1952, Whitley, accompanied by his lawyer, went to the officers of the Alcohol and Tobacco Tax Unit in New York City and there he executed a detailed written confession (381-386). This written confession has been appended by Judge Frank to his dissenting opinion, and is reprinted at pages 324-326 of 229 F. 2d. For the convenience of the Court and Counsel, this confession is also reprinted herein as an Appendix to this brief.

During the course of the trial the Government offered in evidence Whitley's written confession (386), which was received over the objection of all defendants, including Whitley (727). The trial judge admonished the jury that this confession was being received only as against Whitley and was not evidence against any other defendant on trial, including petitioner Delli Paoli (727-737). Later on during his charge to the jury, the trial judge again referred to this written confession by Whitley and again advised and instructed the jury that they were to consider this confession only as against Whitley (928-929).

Summary of Argument

From the facts in the case, there is no scintilla of evidence linking petitioner with the conspiracy charged in the indictment. At best, petitioner's conduct was suspicious,

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[3] The Government has made much argument over this incident, which it characterizes as Delli Paoli's "attempted flight", both in the Court of Appeals and in its brief in opposition to the petition for certiorari in this Court. Significantly, the agent who engaged Delli Paoli in conversation at the service station, Agent Fay, was not called as a witness at the trial and the facts of the transaction between him and Delli Paoli are not in the record.

not criminal. *United States* v. *Carengella*, 198 F. 2d 3, 7 (7th Cir.) The series of observations by Government agents covering two years of isolated and separate instances, none of which were criminal or surreptitious, fails to link petitioner with the conspiracy ultimately proved. Petitioner's presence and association with several of the co-conspirators during the course of the conspiracy is not evidence of guilt. *United States* v. *Di Re*, 332 U.S. 581; *United States* v. *Williams*, 341 U.S. 58, 64, footnote 4. The "drag-net of conspiracy" theory must not be permitted to sweep petitioner within it. *United States* v. *Falcone*, 109 F. 2d 579, affirmed, 311 U.S. 205; see *Krulewitch* v. *United States*, 336 U.S. 440, concurring opinion at pp. 445-458.

The receipt in evidence of the post conspiracy written confession of co-defendant Whitley was improper under the circumstances of the case, notwithstanding the trial judge's admonition and instructions to the jury that this confession was being received and was to be considered only as against Whitley. The fact that this written confession contained details of petitioner's alleged criminal conduct which went before the jury, nevertheless constituted prejudicial error. *Krulewitch* v. *United States*, 336 U.S. 440; *Kotteakos* v. *United States*, 328 U.S. 750, 764-765.

Argument

The trial of this case covered eight trial days. All of the direct evidence was produced by the prosecution, with the defendants offering no direct case, relying solely on cross-examination to establish their defense to the indictment. The evidence introduced consisted principally of the narration of observations and surveillances by Government agents. A few non-agent witnesses were called to testify and these were all neighbors residing in the immediate vicinity of 1024 Harding Park, Bronx, New York. From

all of the evidence introduced the only credible evidence of criminal conduct was the evidence discovered on the night of December 28, 1951. However, in order to lay a foundation for the maximum exploitation of this evidence and thereby to invest this case with the sense of it being a long-range criminal undertaking, the prosecution has relied upon a psychological device of "relation back." Thus, the discoveries of the final night result in the earlier observed events being called criminal *ab initio*. By this technique the prosecution created on this trial an atmosphere of criminal conspiracy, to be imputed to every observed incident or transaction commencing with December 1949, through the events of December 28, 1951. The chronological narration of these observations by the Government agents has each of these events transformed into a sinister act, confirmed as such by the events of the final night.

In other words, every act, deed, meeting, conversation or transaction from December 1949, until the night of December 28, 1951, becomes characterized as a link in the chain of conspiratorial conduct, with proof of the fact that it was criminal conduct derived solely from subsequent events. This is done without regard to the actual innocence of petitioner, or to the fact that all of his activities were freely open and obviously remote to any criminal conduct subsequently discovered.

A criminal enterprise having been discovered on December 28, 1951, everything which went before is deemed, imputed or argued to be originally part of the criminal enterprise, to be criminal conduct, even though there was no *evidence* introduced on the trial to substantiate the characterization of these prior acts as criminal. It is then argued that the totality of these facts, including the events of December 28, 1951, are sufficient to establish a criminal conspiracy from December 1949 involving this petitioner by *circumstantial evidence*.

This in substance is the logical analysis of the case against petitioner, for no scintilla of direct proof was introduced linking him to the illicit alsohol discovered on the final night. No really circumstantial evidence was introduced warranting the inference that petitioner was engaged in the criminal enterprise of the co-defendants, to the exclusion of every reasonable hypothesis of innocence. When the facts of the case which allegedly implicate petitioner are examined under this analysis their value as evidence disappears and the full importance of the need by the prosecution to use Whitley's post-conspiracy written confession against petitioner becomes apparent. The great harm done petitioner by the use of this confession is obvious; it is the only substantial document linking him to this case.

One further general observation is appropriate here. Petitioner was named only in the conspiracy count of this indictment; he was specifically excluded from the substantive counts against Margiasso and King. If petitioner's participation in the conspiracy was as substantial as the Government contends, then it should follow that his presence at the Bruckner Boulevard service station on December 28, 1951, both with Margiasso and King, is evidence of aiding and abetting,[4] with the same proof required to establish the conspiracy sufficient to sustain a conviction against him for the substantive offenses.[5]

But petitioner was not named in the substantive counts. The proof of the transactions of December 28, 1951 shows only that he was present at the service station. No further participation in any criminal activity is alleged or proved against him.

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[4] Title 18, United States Code, Section 2.

[5] *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-620; *Pinkerton* v. *United States*, 328 U.S. 640.

Thus, the posture of the case becomes this: For all of the observations of petitioner for the times prior to December 28, 1951, no conspiratorial conduct is shown; for the events of December 28, 1951, he is shown only to be present at the scene of some non-secretive criminal transactions, with the Government charging him only with conspiracy for the events of that evening, and not with aiding and abetting the substantive crimes committed at that time.

Judge Learned Hand writing the Court's opinion below treated petitioner's connection with the conspiracy as follows:

> "The whole business was illegal and carried on surreptitiously; and the possibility that unless he (Delli Paoli) were a party to the venture, Pierro and Margiasso would have associated with him to the extent we have mentioned is too remote for serious discussion." (229 F. 2d 319, 320)

In dissenting, Judge Frank's statement in this regard is: "Most of this evidence consists of testimony which, if believed, shows that he (Delli Paoli) fraternized with the other defendants." (229 F. 2d 319, 322).

I

There Was No Credible Evidence Linking Petitioner to the Conspiracy Herein.

Petitioner's "association" or "fraternization" with the conspirators in this case is not evidence of his criminal conduct. Giving the proof presented by the Government witnesses the aspect most favorable to the Government, the best that could be said for the case against petitioner is that his conduct was "suspicious". Suspicious conduct is not criminal conduct and this conviction founded on sus-

picions, rather than legal proof of petitioner's participation in the conspiracy, cannot stand.

The proper treatment to be made of suspicious conduct only was made in the case of *United States* v. *Carengella*, 198 F. 2d 3, 7, where the Court of Appeals for the Seventh Circuit, held as follows:

> "Tenerelli's further testimony that Blandi made inquiry as to police inquiries was not binding upon Di Vito or Carengella who were not present. As to Blandi, it does no more than arouse the suspicion that he had a guilty conscience about something, but it takes something more than a robust suspicion to convict a defendant in a criminal case. United States v. Wainer, 7 Cir., 170 F. 2d 603, 606.
>
> Association with guilty men may create suspicion, but it is not evidence of sufficient weight to convict under the statute in question. United States v. O'Brien, 7 Cir. 174 F. 2d 341, 345. We think the judgments against Di Vito and Blandi must be reversed."

Petitioner and the co-defendants Pierro and Margiasso were obviously good friends. It is from the knowledge of their friendship that the inference is sought to be drawn that they must necessarily have been engaged together in a criminal conspiracy. To support this inference every transaction or incident in which they were observed together is characterized as evidence of participation in the criminal enterprise, no matter how remote or unrelated to subsequent events these incidents may have been. Thus is the doctrine of "guilt by association" carried to its extreme application against this petitioner.

In the case of *United States* v. *Di Re*, 332 U. S. 581, this Court set forth the rule that the presence of a defendant with criminal offenders is not evidence of complicity au-

thorizing criminal conviction. In that case, Di Re was convicted of knowingly possessing counterfeit gasoline ration coupons which were discovered on his person when he was arrested with other offenders. The case turns on whether the arrest and bodily search of Di Re were justified by the fact of his presence only with the other offenders, as to whom an informer had given information of criminal activity to the federal authorities. The Court of Appeals for the Second Circuit reversed Di Re's conviction and held that both his arrest and the search of his person were violative of the Fourth Amendment of the Constitution, since there were not reasonable grounds for the arrest and the search of his person incident to such arrest.[6] The majority opinion of the Court of Appeals reiterated the prior holding of that Court that a defendant's mere association and presence with wrongdoers is not sufficient to sustain a conviction for aiding and abetting or conspiracy.[7] This Court thereupon affirmed the holding of the Court of Appeals, stating on this point:

> "An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial

[6] 159 F. 2d 818, *per* Learned Hand, Ch. J., Clark, C.J., dissenting.
[7] *United States* v. *Peoni* (2d Cir.), 100 F. 2d 401, 402.

to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings." (332 U. S. 581, 593).

The *Di Re* holding was approved by this Court in *United States* v. *Williams*, 341 U. S. 58, 64, footnote 4; See also *Hicks* v. *United States*, 150 U. S. 442. In the *Carengella* case, *supra*, 198 F. 2d 3, 7, the rule is stated as follows:

> "One is guilty as an aider and abettor when he consciously shares in any criminal act. Nye and Nissen v. United States, 336 U. S. 613, 619, 69 S. Ct. 766, 93 L.Ed. 919; United States v. Johnson, 319 U. S. 503, 518, 63 S.Ct. 1233, 87 L.Ed. 1546. The rule is expressed in the case of United States v. Williams, 341 U. S. 58, 64, 71 S. Ct. 595, 599, 95 L. Ed. 747, in this language: 'Aiding and abetting means to assist the perpetrator of the crime. * * * To be present at a crime is not evidence of guilt as an aider or abettor. Hicks v. United States, 150 U. S. 442, 447, 450, 14 S. Ct. 144, 145, 147, 37 L.Ed. 1137. Cf. United States v. Di Re, 332 U. S. 581, 587, 68 S. Ct., 222, 225, 92 L. Ed. 210' "

By comparison with the facts in this case, it would appear that the *Di Re* case was much stronger for the Government's point of view. In *Di Re*, the defendant was seated between two main offenders in the automobile where the counterfeit ration coupons were passed; more than one hundred inventory gasoline ration coupons were found on his person in an envelope concealed between his shirt and underwear. His presence in the automobile, if we apply the Government's theory of conduct "criminal *ab initio*", was surely that of an aider and abettor or a co-conspirator. In this case, at no time was Delli Paoli found in the possession of or in the vicinity of illicit alcohol (except perhaps when Margiasso delivered to King his vehicle loaded with

illicit alcohol at the public service station), or in any secretive or hideout situation. All of the observations of Delli Paoli disclose that he engaged in normal routine open non-criminal conduct. An imputation of criminality to his every movement is required to sustain the present conviction; such imputation is unjustified by the record in this case.

On those occasions when the agents were intensifying their surveillance of Delli Paoli and the others, still no evidence of criminal conduct was discovered. On one occasion (December 4, 1951) during broad daylight, the agent Silvers observed Delli Paoli drive to 1124 Harding Park, back his automobile up to the garage doors and open them (143-144). Silvers then testified that at that precise moment, without observing more, he discontinued his observations and left the vicinity (144). The Government contends that this garage was the "drop" for illicit alcohol, and yet on this occasion no illicit alcohol or paraphernalia for the traffic of illicit alcohol was observed. Further, on the last occasion Delli Paoli was observed at the garage, on December 10, 1951, he was observed only to deliver some furniture in a truck and place it in the garage (147). At no time until December 28, 1951 was illicit alcohol connected with this garage. After December 10, 1951, Delli Paoli was not again connected with the garage. A period of eighteen days elapsed until December 28, 1951 when the illicit alcohol was discovered hidden in the garage, with Margiasso in possession of the keys to the garage door lock.

On December 28, 1951, Delli Paoli was observed at the Bruckner Boulevard service station. His presence there, as well as the presence of a great many other persons (293) at this public service station was not secretive or surreptitious. He conversed with King, with whom Margiasso had criminal dealings, while his automobile was being serviced on the greasing rack (159-161). The sinister cast of criminality applied to Delli Paoli's talking with King de-

velops only from King's subsequent apprehension that night with a quantity of illicit alcohol found in his automobile (163).

Finally, Delli Paoli is charged with attempting to flee from arrest that same night when, after several hours away, he returned to the service station (180). In the Court of Appeals, this evidence of attempted flight was characterized by Judge Frank as "not very strong"[8]; Judges Hand and Medina ignored the Government's argument on this point. Nevertheless, the Government has repeated the argument that there is evidence of attempted flight by Delli Paoli in this case, which attempted flight may be considered as evidence of consciousness of guilt. The facts of the situation as to Delli Paoli's return to the service station at about 11:30 p. m. that night, his conversation with Agent Fay (as to the details of which there is no testimony except Agent Silvers' characterization that there appeared to be "some sort of argument going on between the two of them" (180)), and his starting to back his automobile out of the service station when he was apprehended, are clear in the record (180-181, 414-415). These facts do not support an inference of attempted flight. There is no testimony in this record that Delli Paoli was placed under arrest, or was attempted to be placed under arrest, and thereafter sought to flee. The record is barren of any testimony that Delli Paoli knew or had reason to believe that he was being arrested and thereafter he attempted to flee. As a matter of fact, Agent Murphy testified that it was after his apprehension that Delli Paoli was placed under arrest (415). Unquestionably, there is no evidence of flight in this case.

It is strange that the Government should argue that this petitioner attempted to flee from arrest in this case where

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[8] See footnote 1 at p. 322 of 229 F. 2d.

the only charge later made against him was conspiracy; he concededly committed no substantive criminal offense, either that night or any other night. His alleged offense did not involve any public disturbance; and there is no evidence that he was advised he was under arrest prior to his alleged attempted flight. Had this petitioner not engaged in an "argument" with Agent Fay and had not sought to leave the scene of events, the argument would probably be advanced by the Government that his acquiescence in his arrest and his failure to protest his innocence would be evidence of his guilt, as was contended in the *Di Re* case, 332 U. S. 581, 594-595. Of course, this Court rejected the "acquiescence" argument in the *Di Re* case; it should reject the "attempted flight" argument in this case.

On principle this Court should reject once again the "drag-net of conspiracy" theory which typifies this case. Judge Learned Hand expressed the concept most clearly in his opinion in *United States* v. *Falcone*, 109 F. 2d 579, 581:

> "So many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

This Court affirmed the *Falcone* decision at 311 U. S. 205. See also *United States* v. *Andolshek*, 142 F. 2d 503, 507.

The late Mr. Justice Jackson in his famous concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 445, expressed the fear felt by that enlightened jurist of the indiscriminate use of the conspiracy indictment:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggest that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." (336 U.S. 440, 445-446).

Instead of a more discriminating use being made of the conspiracy indictment since the decision of the *Krulewitch* case in 1949, it appears that the conspiracy indictment concept is continuing to expand and to be more indiscriminately used by federal prosecutors.

Every new case involving more than one defendant is an opportunity to charge a count in conspiracy. The liberal rules of evidence in conspiracy cases permit all sorts of matters to be developed on the trials and to be presented to the juries. These matters are denominated as "preliminary" or "background"; much evidence is tendered "subject to correction"; and endless acts and declarations of others no matter how remotely connected to particular defendants, are introduced as evidence of conspiracy, becoming admissible by charging these others either as co-defendants or merely as "co-conspirators but not as defendants." All this great mass of material is heard by juries who naturally conclude that the particular conspiracy case before them involves diabolical and pernicious scheming and criminal activity, even though in substance it involves the simplest set of facts. The present case is a classic example of this technique. Here the prosecution went very

far afield to lay a foundation that this case involved a long-range conspiracy, when in substance there was only credible proof as to the facts of the final night. Thus this petitioner was ensnared in this "dragnet of conspiracy."

Considering the mass of the evidence ostensibly admitted against petitioner to prove his participation in the conspiracy, no wonder then that after eight days of trial, the jury probably felt and believed that this petitioner must necessarily have been a party to the conspiracy in this case. Justice Jackson described the typical situation in these words:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge on conspiracy which I will not enumerate." (*Krulewitch* v. *United States,* 336 U.S. 440, 454).

That this description fits the facts in this case insofar as this petitioner is concerned is certain; that there was no credible evidence introduced connecting petitioner with the conspiracy in this case is equally certain. Accordingly, the judgment of conviction should be reversed for this reason alone.

II

The Receipt in Evidence of the Post Conspiracy Written Confession of Co-Defendant Whitley Was, Under the Circumstances in This Case, Prejudicial to Petitioner's Rights.

On January 5, 1952, more than a week after all of the defendants in this case were apprehended, defendant James Whitley appeared with his attorney at the offices of the Alcohol & Tobacco Tax Unit and there executed a detailed written confession implicating himself, defendant Margiasso and petitioner in the conspiracy to sell illicit alcohol. This confession, reprinted herein as an Appendix, contains details of alleged criminal conduct by petitioner and effectively completes the picture attempted to be drawn by the prosecution of petitioner's alleged participation in the conspiracy.

During the trial, the Government offered in evidence this written confession (386) and it was received as Government's Exhibit No. 12, over the objection of all defendants, including Whitley (727). In receiving this written confession in evidence, the trial judge admonished the jury that it was being received and was to be considered only as against Whitley (727-737). During his charge to the jury, the trial judge further admonished and instructed the jury that they were to consider the confession only as against Whitley and that it was not to be considered as evidence against any of the other defendants named therein (928-929).

There is no dispute as to the fact that this written confession was made at a time subsequent to the termination of the conspiracy alleged in the indictment; that it forms no part of the conspiracy; and that it was not made in furtherance thereof. There is no dispute that this document contains details of alleged criminal conduct by petitioner

and that it was seen and read by the jury. It is petitioner's argument that the receipt in evidence of this written confession under the circumstances of this case, notwithstanding the trial judge's admonition and instructions to the jury that it was being received and was to be considered only as against Whitley, nevertheless had the effect of being received and being used as evidence against petitioner, thereby violating the rule against inadmissible hearsay set forth in *Krulewitch* v. *United States*, 336 U.S. 440. Petitioner contends that without this written confession before it the jury would have had no evidence connecting him with the conspiracy herein; that notwithstanding the trial judge's admonition and instructions to the contrary, the jury nevertheless used and considered this document in finding petitioner guilty of criminal conspiracy.

The majority of the Court of Appeals held that this written confession was admissible in evidence as an exception to the hearsay rule; and, accordingly, that it was not error to receive it, considering the trial judge's admonition to the jury that it was to be used only in determining the guilt or innocence of Whitley. Judge Learned Hand, writing the Court's opinion, conceded that "we have recognized without reserve that after the end of any concerted action to admit in evidence the declaration of one of several defendants accused of conspiracy is in effect to accept hearsay against all but the declarant." (229 F. 2d 319, 321) To justify this admission of hearsay Judge Medina in his concurring opinion pointed out the trial judge's admonition and cautionary instructions, stating then "Nor am I able to discover any basis for supposing that the jury did not follow his instructions." (229 F. 2d, 319, 322)

Judge Hand relied upon a series of cases in the Second Circuit extending over a twenty-five year period, authoriz-

ing receipt of such evidence,[9] declaring the solution of this problem as "especially a matter for the exercise of discretion by the trial judge." (229 F. 2d, 319, 321) However, Judge Hand candidly noted that the result of receiving these post-conspiracy hearsay declarations in evidence obviously fortifies the "dragnet of conspiracy" theory:

> "Undoubtedly the ability to introduce them adds to the inducement to sweep all those concerned in a venture into one indictment; and possibly it would have been better, had the price of the admissibility of separate declarations, made after the event, been a separate trial of the declarant; for it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition. Possibly it would be extreme to say that nobody can ever so far control his reasoning that he will not in some measure base his conclusion upon a part of the relevant evidence before him, which he has been told to disregard; but at least it is true that relatively few persons have any such power, involving as it does a violence to all our habitual ways of thinking. Hence, although the doctrine is well settled that such declarations are competent, provided the placebo goes along with them, there is no reason why this should be the final measure of protection granted to the defendants other than the declarant. Unhappily, it is extremely difficult to escape the dilemma that must always arise on such occasions, because on the one hand the declaration should remain unimpaired as against the declarant, and yet it must be in some measure mutilated in favor of the others." (229 F. 2d 319, 321)

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[9] *Nash* v. *United States*, 54 F. 2d 1006; *United States* v. *Gottfried*, 165 F. 2d 360, 367, cert. den. 333 U.S. 860; *United States* v. *Leviton*, 193 F. 2d 848, 855, 856, cert. den. 343 U.S. 946; *United States* v. *Kelinson*, 200 F. 2d 600.

In dissent, Judge Frank called attention to the basic and inherent evil of the situation created by these post-conspiracy hearsay declarations, relying principally upon *Krulewitch* v. *United States*, 336 U. S. 440:

> "There are no differences between Krulewitch and the instant case except that Whitley was a co-defendant of Paoli and that the trial judge admonished the jury not to consider Whitley's confession as proving the guilt of the other defendants, including Paoli. But those differences can have no practical significance. For Judge Hand concedes that, almost, certainly, the cautionary admonition had no effect on the jury, a concession in accord with Mr. Justice Jackson's comment in Krulewitch (336 U. S. at 453): 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practising lawyers know to be an unmitigated fiction. Skidmore v. Baltimore & Ohio R. Co., 167 F. (2d) 54.' It follows, I think, that Krulewitch governs here, and that accordingly the reception of the confession was, as to Paoli, reversible error. Indeed, the harm here exceeded that in Krulewitch: There the objectionable out-of-court statement was oral; here it was typewritten." (229 F. 2d, 319, 323)

To meet the vital issue of the proper administration of federal criminal justice and to devise a solution for this recurrent problem of post-conspiracy hearsay declarations, Judge Frank proposed a rule consistent with protection of the rights of innocent persons charged with conspiracy, without doing violence to the Government's right to present its evidence:

> "In the light of Krulewitch, I think something like the following is the correct rule: When several defend-

ants are on trial for criminal conspiracy, if the government seeks to put in evidence an out-of-court statement by one defendant which is hearsay as to the others (i.e., an out-of-court statement made after the conspiracy has terminated), then

(a) unless all references to the other defendants can be effectively deleted (so that the statement will contain no hint of the others' guilt) and unless those references are deleted,

(b) the trial judge (1) must refuse to admit the statement or (2) sever the trial of those other defendants." (229 F. 2d 319, 324)

Judge Hand's solution for this problem is to allow the trial judge's discretion to govern, "provided the placebo (cautionary instruction) goes along with them."[10] Judge Frank's answer to Judge Hand is that *Krulewitch* destroyed this rule, and that in any event, "in criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend." (229 F. 2d 319, 323, and especially footnote 7)

During the trial of this case when the Whitley confession was about to be received in evidence, petitioner's trial counsel requested deletion of petitioner's name and the de-

[10] In a further elaboration of the opinions of the Court of Appeals in this case, Judge Frank in dissenting in the case of *United States* v. *Grunewald*, 233 F. 2d, 556, 574, recited a definition of "placebo" as "a 'medicinal lie' which undermines 'a truly moral relationship between physician and patient' ", comparable to "a kind of 'judicial lie': It undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice." Judge Frank also pointed up the psychological effect on jurors of the "cautionary instruction" by repeating Mark Twain's story of the boy told to stand in a corner and not think of a white elephant, which Judge Frank had first related in his dissenting opinion in *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 656.

tails of his purported criminal conduct before the confession was received. The request was denied and thereupon the jury had the document before them in unaltered form. The argument was made that as proper practice excision or deletion of the hearsay should have been directed as a condition of receiving this confession. This argument was repeated before the Court of Appeals, with the Court agreed that such deletion would not have achieved the purpose of the request. Although deletion might not have achieved the desired purpose in this case, it is submitted that the underlying objective of keeping the objectionable hearsay from the jury outweighed any shortcomings which might have been created by the deletion. Of course complete rejection of the hearsay confession would have been the proper ruling by the trial judge.[11]

To demonstrate the harm done to petitioner by the receipt in evidence of the Whitley confession in its original form, one has to consider only that this confession was a written document, and not the oral testimonial statement of a witness relating a conversation had with a co-conspirator or narrating a post-conspiracy declaration. Such oral statements are capable of being kept out of evidence, or it is possible to have a witness relate only those portions of such declarations as are admissible. Objectionable narrated statements can easily be ordered stricken from the record, with the jury directed to disregard them, while written confessions cannot lightly be disregarded by jurors. In the history of our culture written statements have imported so much more deliberation and significance on the part of the writer or author that they are given greater credence and value by their readers. When the jury in this case had Whitley's confession before them, its full

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[11] See Morgan, *Some Problems of Proof under the Anglo-American System of Litigation* (1956), especially those lectures concerning hearsay, pp. 106-195.

significance in describing petitioner's alleged participation in the conspiracy was fixed in their minds. No amount of oral admonition or instructions could thereafter undo the harm already created. The "mental gymnastic" [12] then truly was beyond their powers.

The Government has argued that the *Krulewitch* rule is inapposite here, for the reason that in *Krulewitch* the defendant stood trial alone with the co-conspirator's declarations inadmissible, while here the confessor stood trial along with co-defendants, and as to the confessor the confession was admissible. Subsuming this argument is an apparent attempt to devitalize the forceful rules laid down in *Krulewitch* by attempting to narrow its application to its factual situation. However, it seems clear that the broad principles of justice enunciated in that case relative to conspiracy trials should not be devitalized in this case.

The Government has also argued that this Court has recognized the propriety of admitting post-conspiracy declarations in multiple defendant conspiracy cases where the "cautionary admonition" has been given. [13] While this is so, nevertheless, the cases supporting this argument have each indicated that the error of receiving the inadmissible hearsay in effect has been "harmless error." [14] In *Lutwak v. United States*, 344 U. S. 604, this Court explained:

> "In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other

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[12] *Nash* v. *United States*, 54 F. 2d 1006, 1007, (2d Cir., *per* Learned Hand, C.J.)

[13] *Opper* v. *United States*, 348 U.S. 84; *Lutwak* v. *United States*, 344 U.S. 604; *Blumenthal* v. *United States*, 332 U.S. 539.

[14] Rule 52 (a), Federal Rules of Criminal Procedure, Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declarations. These declarations must be carefully limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purpose. While these difficulties have been pointed out in several cases, e.g. *Krulewitch* v. *United States, supra,* at 453 (concurring opinion); *Blumenthal* v. *United States* 332 U.S. 539, 559-560; *Nash* v. *United States,* 54 F. 2d 1006, 1006-1007, the rule has nonetheless been applied. *Blumenthal* v. *United States, supra; Nash* v. *United States, supra; United States* v. *Gottfried,* 165 F. 2d 360, 367." (344 U.S. 618-619)

Then in applying this rule to the facts of the case before it; this Court observed:

"In our search of this record, we have found only one instance where a declaration made after the conspiracy had ended was admitted against all alleged conspirators, even though not present when the declaration was made. Was the admission of this one item of hearsay evidence sufficient to reverse this case?

"We think not. In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but not a perfect one." (334 U.S. 619-620)

The test then may very well be at what point do you stray beyond the bounds of propriety, beyond the point of

no return, where admonitions and instructions to juries by trial judges are fruitless and incapable of being heeded. It is submitted that in this case, this point was reached and passed. *Kotteakos* v. *United States*, 328 U.S. 750, 764-765.

In considering the evidence of record against this petitioner, it is clear that the error of receiving Whitley's hearsay written confession substantially influenced the jury and that the verdict and judgment against petitioner should not stand.

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (*Kotteakos* v. *United States*, 328 U.S. 750, 765.)

See also *Fiswick* v. *United States*, 329 U.S. 211; *Bihn* v. *United States*, 328 U.S. 633.

The conviction of petitioner Orlando Delli Paoli should be reversed and a judgment of acquittal dismissing the indictment should be entered. *Bryan* v. *United States*, 338 U.S. 552; Rule 29, Federal Rules of Criminal Procedure.

Conclusion

It is therefore respectfully submitted that the judgment of the Court below should be reversed and that judgment of acquittal dismissing the indictment be entered.

DANIEL H. GREENBERG,
Counsel for Petitioner.

August, 1956.

APPENDIX

Government's Exhibit No. 12, Confession of James Whitley

UNITED STATES OF AMERICA,

Southern Judicial District of New York, ss:

JAMES WHITLEY, being duly sworn, deposes and says:

I reside at 65 West 133rd Street, Apartment 4E, New York, N.Y. I make this statement in the presence of my attorney, Mr. Bertram J. Adams of 299 Broadway, New York, N.Y., after being fully advised that under the Constitution of the United States I have the privilege and right of not saying anything at all; that if I answer any question anything I say could be used against me in any criminal proceeding. Being fully aware of my rights, I make this statement of my own free will to Special Investigators Albert Miller and William Greenberg in the office of the Alcohol and Tobacco Tax Division, 143 Liberty Street, New York, N.Y.

Sometime around Thanksgiving of 1949, a friend of mine introduced me to a man known to me as Tony. This man asked me if I wanted to buy some alcohol and I told him I did. The meeting occurred on 126th Street in Harlem. The man then told me to meet him the next day at a candy store on the south side of 119th Street, just east of First Avenue. When I got there, Tony introduced me to a man whose name I do not know. This man told me to meet him that night on 100th Street and Second Avenue. I met him there. He took my car and drove away. A little while later he came back and told me that the car was parked on 103rd Street and Second Avenue. I had purchased two 5-gallon cans of alcohol on that occasion and paid him just before he drove away in my car. Thereafter, I would meet this man around the candy store about twice a week and the same procedure would be followed. This continued until about June or July of 1950.

Tony was about 5' 4" in height, about 55 years of age, had a dark complexion and stocky build and, I believe, had brown eyes. He was apparently of Italian extraction. The other man who sold me the alcohol was apparently also of Italian descent, and he had a dark complexion. He spoke in broken English. He had black hair and was about 27 or 28 years of age and was about 5' 9" in height. (Some time in 1950, Investigator Whited of the Alcohol and Tobacco Tax Division asked me about him and showed me his picture.)

At about that time, this man sent me to Carl. He introduced Carl to me and told me that Carl would take care of me from then on. I would meet Carl on Second Avenue between 121st Street and 122nd Street in a seafood restaurant and would purchase the alcohol from him.

Carl is about 5' 10" in height, has blond hair, blue eyes, light complexion and is about 30 years of age. He is apparently of Italian descent. He is about 160 pounds. Carl would usually come to my home to see me and ask me if I needed anything.

Just before Carl went to jail in 1950, he introduced me to Bobby. I have been shown a photograph bearing ATU 3643 N. Y. dated 12/29/51 of Orlandi Delli Paoli, and I identify it as that of the man known to me as Bobby. This was sometime in the summer of 1951. Bobby would come to my house to see me. If I placed an order with him he would set the date and the time for seven or eight o'clock in the evening when I was to pick up the alcohol. The first time I met him at 138th Street and Bruckner Boulevard, in the Bronx. He took my car and was gone about one-half hour and then returned with the alcohol. The second time I met him on the corner of Bruckner Boulevard and Soundview Avenue. From then on he would alternate the procedure; I would meet him one night on 138th Street and the next time at Soundview Avenue.

About two months ago, I began meeting Bobby at the Shell gasoline station known as the Bronx River Service Station on Bruckner Boulevard just past the bridge crossing over to Bronx River. I would usually leave my car parked on the street near the gas station and meet Bobby outside of the gas station. He told me not to go into the gas station as the attendant might not like it.

About a month ago, Bobby introduced me to another man whose name I do not know. I have been shown a photograph marked ATU 3642 N. Y., dated 12/29/51 of Carmine Margiasso, and identify it as that of the man to whom Bobby introduced me. Bobby also told me that if he was not present when I met Margiasso, I was not to give Margiasso any money but was to pay him (Bobby) the next time I saw him. Margiasso also followed the same procedure: He would take my car, would be gone about 20 minutes, and then return with the alcohol. Margiasso picked up my car about four times.

My purchases from Bobby would consist of two or three 5-gallon cans of alcohol at a time and were made once or twice a week. The last two times I paid Bobby $38 a can.

On the evening of Friday, December 28, 1951, I had ordered two cans, and when Margiasso took my car I waited in the lunch room near the gas station. When I thought it was time for Margiasso to return, I went over to the gas station and waited in the office after purchasing a package of cigarettes. Two officers who were Federal officers came in and placed me and William Hudson under arrest. Shortly after that happened, Bobby drove up and was arrested by the Federal officers.

I have read the above statement consisting of three pages and it is true to the best of my knowledge and belief.

(S). JAMES WHITLEY.

Sworn to before me this 5th day of January 1952.

(S.) WILLIAM GREENBERG, *Spec. Inv.*

Witness:

(S.) ALBERT MILLER, *Spec. Inv.*

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 664

ORLANDO DELLI PAOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13-27; R. 1026-1040) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1956 (R. 1041). The petition for a writ of certiorari was filed on February 3, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for conspiracy to sell, and for selling, illicit alcohol.

2. Whether a post-conspiracy confession by a co-defendant conspirator, showing petitioner's guilt, was properly admitted in evidence where the court gave cautionary instructions that the confession was to be considered only in determining the guilt of the confessing defendant and not that of the other co-defendants (including petitioner).

STATEMENT

Petitioner and four co-defendants were convicted in the United States District Court for the Southern District of New York of conspiracy to sell illicit alcohol (R. 942, 970-972). Petitioner was sentenced to imprisonment for a period of two years (R. 965, 1002). On petitioner's appeal (R. 1012), his conviction was affirmed (R. 1041). Judge Learned Hand wrote the court's opinion, Judge Medina filed a concurring opinion, and Judge Frank dissented (Pet. App. 13-27).

The evidence, consisting for the most part of testimony by government agents who had observed the defendants' activities, may be summarized as follows:

On December 7, 1949, defendant Pierro and petitioner drove to a cottage at 1124 Harding Park in the Bronx, New York, and inspected a garage which was part of these premises (R. 23-24). Later, in the Tivoli Bar, Pierro, in the presence of petitioner and defendant Margiasso, had several

conversations with the owner about purchasing the Harding Park property (R. 80-83). On December 29, 1949, the sale was consummated, when Pierro's sister paid the $2,000 purchase price (R. 89, 92, 113-115). Thereafter, neighbors saw petitioner and Pierro a number of times on the premises at 1124 Harding Park. A woman living there introduced petitioner as her cousin (R. 540, 542, 548, 565).

On April 10, 1950, petitioner and Pierro drove to a parking lot where they inspected a Diamond T truck.[1] Two days later, a government agent saw it parked in front of 1124 Harding Park (R. 32-33). Pierro and another man were hammering and sawing in the garage (R. 33, 35, 48). Before the Harding Park garage had been purchased there were windows in it, but later these were boarded up or painted over (R. 94-95, 97, 557, 46).

On May 1, 1950, Pierro drove petitioner to 1124 Harding Park; from there, petitioner drove the Diamond T truck to a filling station for gasoline, and then parked it on a lot opposite his residence (R. 34-35, 43-44).

On December 3 and 4, 1951, the Diamond T truck was parked on the lot opposite petitioner's residence (R. 143-144, 247). On December 4, 1951, petitioner drove in his Cadillac from his home to 1124 Harding Park, backed his car toward the garage doors, and opened them (R. 144, 275, 444-445).

On December 10, 1951, petitioner and Margiasso

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[1] This truck was registered under a false name (R. 133, 207-208).

went to the lot opposite petitioner's residence, took from a Dodge truck several bundles of flat cartons, suitable for wrapping 5-gallon cans, and placed them in the Diamond T truck, which they drove to the Harding Park garage. After unloading the cartons and some furniture in the garage, they returned to petitioner's residence (R. 147, 445, 473-474, 581-586).

On December 18, 1951, after driving his Dodge car to the Harding Park garage, Margiasso went to a gasoline station at 1430 Bruckner Boulevard at 8:45 p.m. About 10 minutes later petitioner arrived at the station in his Cadillac. About 9:00 p.m., two men appeared in a Pontiac, which Margiasso alone drove away. After he returned, the two men left in the Pontiac which appeared to be "heavy loaded". The government agents following the car lost it because of icy roads (R. 396-401, 154-155, 590, 591-593). Later that night, petitioner's Cadillac and Margiasso's automobile were parked near the Tivoli Bar (R. 597).

On the evening of December 28, 1951, the most important date involved, government agents were observing the Bruckner Boulevard gasoline station, through field glasses (R. 159). At about 7:00 p.m., co-defendant King drove up in a Plymouth coupe and talked to Margiasso, who drove away in the Plymouth (R. 401-403, 599-601). Agents followed Margiasso to the garage at 1124 Harding Park where the garage doors and the trunk of the Plymouth were opened (R. 601-603). Shortly after Margiasso had left the gasoline station, peti-

tioner arrived there in his Cadillac and conversed with King, first while sitting in a parked Dodge car and later in the Cadillac (R. 403-404, 603-604, 159-160). Upon Margiasso's return with the Plymouth, he alighted and King drove it away (R. 405-406, 604, 161). The agents followed King, arrested him, and discovered 19 five-gallon cans of illicit alcohol in the car (R. 406-408, 604-606, 161-163).

At about 10:00 p.m. on December 28th, two men, one of whom was co-defendant Whitley, arrived at the gasoline station in a Pontiac, which Margiasso drove away, leaving the two men at the station (R. 409-410, 608, 168-169). The agents followed Margiasso to 1124 Harding Park, where they saw that the Pontiac was backing into the garage, the doors of which were opened (R. 410, 169). Margiasso was arrested and his keys were taken (R. 411, 610-611, 170, 451, 455-456). One of the keys fitted the ignition of the Diamond T truck parked opposite petitioner's home (R. 417-418), and another was for a lock on the garage door at 1124 Harding Park (R. 612). At the garage, 113 five-gallon cans of illicit alcohol were discovered (R. 416-417, 611-612, 171). At the gasoline station, Whitley was arrested, and about $1,000 was found in a paper bag he had with him (R. 179-180, 329).

On that same evening of December 28th, as the agents and the persons arrested were getting ready to proceed in two automobiles to the police station, petitioner drove his Cadillac into the gasoline

station. After an agent started talking to petitioner, he attempted to back the Cadillac out into the street. One agent drove his car to the rear of the Cadillac in order to stop it, and a police patrol car passing by blocked the other side of the Cadillac. An agent then entered the Cadillac and all parties proceeded to the police station (R. 180-181).

On January 5, 1952, Whitley went with his attorney to the offices of the Alcohol and Tobacco Tax Unit and signed a detailed confession (Pet. App. 24-27; R. 381-386). In the confession Whitley admitted that on several occasions he had made purchases of illicit alcohol from petitioner, and that Margiasso was also involved as the person who would drive Whitley's car to pick up the alcohol and return to the Bruckner Boulevard gasoline station (Pet. App. 25-26).

This confession was admitted in evidence over objection of all defendants with the exception of King, whose name was not mentioned in it (R. 388-391, 727-728). Petitioner's counsel assigned as a reason for his objection the fact that "reference is made to a person known as Bob when there has been reference in the trial that Orlando Delli Paoli has been known as Bobby London" (R. 391). When the confession was received in evidence, the court explained at length that it was to be considered by the jury only against the defendant Whitley (R. 734-735, 736). And in the final charge (R. 924, 928-929) the admonition was meticulously repeated. The court instructed (R. 928-929):

I have heretofore advised you in connection with the written statement of the defendant Whitley that it may be taken into consideration by you only in determining his guilt. Since the statement was made after the arrest, the statement may be evidence against him, but is not evidence against the other defendants, and therefore, your determination as to the guilt or innocence of the other defendants must be made on the other evidence without taking into account at all the statement signed by the defendant Whitley which was introduced in evidence.

ARGUMENT

1. Petitioner asserts (Pet. 8-10) that the evidence against him was insufficient since it disclosed, at most, suspicious conduct and fraternization or association with the other conspirators.

Although the evidence implicating petitioner in the conspiracy was circumstantial, participation in a criminal conspiracy need not be proved by direct evidence; the plan may be inferred from the attendant circumstances. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. The totality of events shown by the evidence—covering a period of two years—was more than sufficient to warrant the jury's inference that petitioner was a member of the conspiracy. These events included petitioner's presence with Margiasso at the time Pierro was negotiating for

purchase of the Harding Park garage, used to store the illicit alcohol; petitioner's inspection of the garage site and appearance there on different occasions; his trips to and from the garage in the Diamond T truck; his conversations at the gasoline station with the purchaser King, while awaiting Margiasso's return with the contraband alcohol; and the attempted flight in his Cadillac at the time of apprehension.[2] As Judge Hand succinctly put it (Pet. App. 15): "The whole business was illegal and carried on surreptitiously; and the possibility that unless [petitioner] were a party to the venture, Pierro and Margiasso would have associated him to the extent we have mentioned is too remote for serious discussion."

This evidence against petitioner consisted of more than mere presence at the scene of a crime or casual association with the other conspirators. In fact the jury was not at liberty to find petitioner guilty upon the basis of fraternization alone, in view of the court's charge (R. 919) that "Mere association of one defendant with another does not establish the existence of a conspiracy." Both courts having found the evidence sufficient to support conviction, there is no occasion for further review by this Court. See *Kann* v. *United States*, 323 U.S. 88, 93; *United States* v. *Johnson*, 319

[2] Judge Frank observed that there was "not very strong evidence of attempted flight" (Pet. App. 19; see R. 180-181). While petitioner's short flight proved abortive, he certainly did everything possible under the circumstances. If the cars of the agent and the police patrol had not closed in upon his Cadillac, he might very well have escaped.

U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

2. With respect to the admission of Whitley's confession (Pet. 10-12), this Court has explicitly recognized the propriety of admitting post-conspiracy declarations against the declarant alone, if accompanied by the admonition that they are not to be considered in determining the guilt of other co-conspirators on trial at the same time. *Opper* v. *United States*, 348 U.S. 84, 95; *Lutwak* v. *United States*, 344 U.S. 604, 618, 619; *Blumenthal* v. *United States*, 332 U.S. 539, 559, 560.[3] In *Lutwak*, although cognizant of the "heavy burden" this procedure places upon jurors, the Court recognized that "the rule has nonetheless been applied". 344 U.S. at 619. Argument that the jury might have been confused about the cautionary charge "amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions". *Opper* v. *United States*, 348 U.S. 84, 95. As Judge Medina pointed out in his concurring opinion, there is here no basis for

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[3] Accord: *United States* v. *Simone*, 205 F. 2d 480, 483-484 (C.A. 2); *United States* v. *Leviton*, 193 F. 2d 848, 856 (C.A. 2) certiorari denied, 343 U.S. 946; *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C.A. 2), certiorari denied, 333 U.S. 860; *Nash* v. *United States*, 54 F. 2d 1006, 1007 (C.A. 2), certiorari denied, 285 U.S. 556; *Cwach* v. *United States*, 212 F. 2d 520, 526 (C.A. 8); *Metcalf* v. *United States*, 195 F. 2d 213, 217 (C.A. 6).

presuming that the jury did not follow the court's instructions (Pet. App. 19).

Under the circumstances of this case, the trial court did not abuse its discretion in permitting the introduction of the confession and was not "called upon to do more than give the admonition" (Pet. App. 17-18). Both Judge Hand and Judge Frank agreed that deleting the names of petitioner and Margiasso from Whitley's statement would not have helped petitioner (Pet. App. 17-18, 22). Petitioner's counsel offered no alternative procedure other than the suggested deletion just before the confession was admitted in evidence. The confession in this case was less incriminating than the statement of the sole co-defendant in *Oppet*, where this Court held that the cautionary instruction was sufficient to protect the defendant.[4]

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[4] Petitioner's reliance upon *Krulewitch* v. *United States*, 336 U.S. 440 (Pet. 10-12), is misplaced, since there the person making the confession was not a co-defendant and the confession was therefore wholly inadmissible at that trial. *Krulewitch* is a reiteration of the principle that a post-conspiracy declaration by a co-conspirator is inadmissible against other members of the conspiracy, a rule recognized by the trial judge in this case.

CONCLUSION

This case was decided in accordance with established legal principles, and there is no conflict in decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 33

ORLANDO DELLI PAOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of Judge Hand for the Court of Appeals, the concurring opinion of Judge Medina, and the dissenting opinion of Judge Frank (R. 1026–1040) are reported at 229 F. 2d 319.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1956 (R. 1041). The petition for a writ of certiorari was filed on February 3, 1956, and was granted on March 26, 1956, 350 U. S. 992. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for conspiracy to deal unlawfully in alcohol.

2. Whether, in a joint trial, the trial judge abused his discretion in refusing petitioner's demand for exclusion from evidence of a co-defendant's post-conspiracy confession, and in admitting the confession solely against the co-defendant, with extensive admonitions that the confession be considered only in determining the guilt of that co-defendant and not in determining the guilt of any other defendants.

STATUTES AND RULES INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * * *.

The Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.) provided:

> SEC. 2803. *Stamps for containers of distilled spirits—(a) Requirement.*
>
> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

SEC. 2806. *Penalties and forfeitures*— * * *

* * * * *

(e) *Evasion of tax, penalty.*

Whenever any person evades, or attempts to evade, the payment of the tax on any distilled spirits, in any manner whatever, he shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded.

SEC. 2913. *Penalty for unlawful removal or concealment of spirits.*

Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

The Federal Rules of Criminal Procedure provide:

Rule 8. *Joinder of offenses and of defendants.*

* * * * *

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constitu-

ting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 12. *Pleadings and motions before trial; defenses and objections.*

* * * * *

(b) *The Motion Raising Defenses and Objections.*

* * * * *

(2) *Defenses and Objections Which Must be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. * * *

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Rule 14. *Relief from Prejudicial Joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Petitioner and four co-defendants were convicted of conspiracy to possess and transport alcohol in unstamped containers and to evade payment of taxes on the alcohol, in violation of 18 U. S. C. 371, and the Internal Revenue Code of 1939, Sections 2803 (a), 2806 (e), and 2913 (R. 908–909, 942, 970–972).[1] Petitioner was sentenced to imprisonment for a period of two years (R. 965, 1002).[2]

At the trial, the government first presented the testimony of federal agents and neighbors who had directly observed the activities of the defendants. Upon the conclusion of this body of testimony, the trial judge admitted in evidence, solely as against the co-defendant Whitley, a written statement of Whitley executed by him after the termination of the conspiracy. (The admonitions and instructions to the jury with respect to this statement are set forth *infra,* pp. 12–17, 32–35.)

1. The eye-witness and documentary evidence

The testimony of the agents and neighbors, independent of and prior to the Whitley statement, may be summarized as follows:

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[1] Two of the co-defendants were also convicted of substantive offenses under the remaining two counts of the indictment charging, respectively, possession of 19 five-gallon cans and 113 five-gallon cans of unstamped alcohol (R. 905–906, 942).

[2] The sentence followed a pre-sentence showing of a prior violation of the laws relating to distilled spirits, petitioner having been sentenced to 90 days for transportation of alcohol in 1946. He had also been sentenced to 30 days for assault and battery in 1936 (R. 945–946).

In December 1949, co-defendant Pierro approached one Krone, who owned a cottage and garage at 1124 Harding Park, in the Bronx, New York City, and discussed the purchase of Krone's property (R. 78–79). Krone had let it be known at the Tivoli Bar, of which petitioner and co-defendants Pierro and Margiasso were also patrons (R. 76, 123–124), that he wished to sell this property (R. 78, 105, 119). After Pierro's approach, there were three or four conversations (R. 80) at which petitioner and Margiasso were generally present although not participating directly (R. 81, 108). Petitioner was known to Krone only under the alias "Bobbie London" (R. 73, 73).[3]

On December 7, 1949, a federal agent of the Alcohol and Tobacco Tax Division observed Pierro driving to petitioner's residence at 1155 Croes Avenue, where Pierro picked up petitioner and then drove to the Harding Park address. There the two walked around the garage structure, inspecting it from the outside and back, for about half an hour to an hour (R. 23–24, 32, 45, 56–57). On December 29, 1949, Krone met with Pierro and a lawyer at the Tivoli Bar to consummate the sale. Title was taken in the name of Pierro's sister, who had nothing to do with any of the negotiations and had never inspected the premises. She appeared in the transaction only upon this occasion and at the closing. She had possession of $2,000 which she handed to Pierro, who handed it to the

[3] A second series of pages 72 and 73 follows the first pages 72 and 73. The instant testimony appears, in different form, on both of the pages numbered 73.

lawyer, who in turn counted and delivered it to Krone (R. 89, 91–92, 112–113, 115).

On April 10, 1950, Pierro was observed driving to petitioner's residence, from which petitioner and Pierro drove to a parking lot and inspected a green Diamond T panel truck (R. 32–33). Two days later, on April 12, the truck was observed parked at the Harding Park garage (R. 33). The truck was registered under a false name (R. 133, 207–208, 419).

On April 12, 1950, Pierro and another man (not recognized by the federal agent) were observed working inside the garage, hammering and sawing (R. 33, 35, 48). Prior to the sale by Krone, the doors to the garage had had glass windows, but thereafter, by the spring of 1950, these were boarded up. This and a narrowing of the door opening were the only changes made in the garage. No work by Pierro on the house itself was observed, the only work being done in the garage (R. 48–49, 94–95, 97, 99, 557–559, 566–567, 573).

For some months after Krone moved out, the cottage was occupied by a new tenant or tenants, with whom the neighbors were unacquainted. Thereafter, it was occupied by Mr. and Mrs. Di Pasquale and three children. The Di Pasquales had no car (R. 536–537, 546–547, 552, 558–559).

On May 1, 1950, Pierro picked up petitioner at the latter's home and drove him to the Harding Park garage. Petitioner took the Diamond T truck, which was parked there, to a filling station for gasoline, and then drove it to a lot opposite petitioner's residence, where he parked it (R. 34–35, 42–44). During 1950

and 1951, the truck was parked for weeks at a time alongside the Harding Park garage. The neighbors never observed the truck being used during the day, but one neighbor, working nights, on a number of occasions in the autumn of 1951 saw that the truck was missing at about 2 a. m., but always back alongside the garage in the morning (R. 543–545, 554, 561–563, 575).

Petitioner was seen on the Harding Park premises by a neighbor in midsummer 1951 and was introduced by Mrs. Di Pasquale as her cousin (R. 540, 542, 548, 552). Another neighbor also saw petitioner once or twice on the premises (R. 564–565, 575). Pierro was seen at the premises five or six times (R. 541–542).

On December 3, 4, and 6, 1951, the Diamond T truck was observed parked opposite petitioner's residence (R. 143–144, 247, 262–264, 267, 273–274). On December 4, petitioner was observed by federal agents leaving his home in his car. He drove to the Harding Park garage, backed his car to the door of the garage, and opened the doors, at which point the federal agents had to move away (R. 144, 275, 277, 444–445).

On December 6, 1951, federal agents followed petitioner to a gas station on Bruckner Boulevard (in the Bronx), where he busied himself about a green Dodge panel truck, bearing no license plates (R. 626–627). On December 10, 1951, the Dodge truck was observed parked next to the Diamond T truck, across from petitioner's residence, still without license plates (R. 146–147, 280–281). On that day, petitioner and Margiasso took from the Dodge truck several bundles of

flat cartons suitable for enclosing 5-gallon cans, placed the cartons in the Diamond T truck, drove to the Harding Park garage, unloaded a wooden portable fireplace and tables in the garage, and drove the truck back to its parking place opposite petitioner's residence (R. 147, 281–286, 445–446, 472–474, 581–588, 647–648). Later on that day, Margiasso returned and drove the Diamond T truck away (R. 148).

At a later time, prior to December 12, 1951, the Dodge truck was painted black in a lot opposite petitioner's residence. License plates registered under a false name (R. 134–135, 208, 419) had also been supplied by December 12, 1951 (R. 148, 258, 289, 471).

On December 18, 1951, petitioner's car was observed parked at the Bruckner Boulevard gas station at about 5:00 p. m. About half an hour later petitioner drove to his residence in it (R. 590–591). At about 6:30 p. m., Margiasso came to the Harding Park garage and went in (R. 149–150, 396–397). Between 8 and 9 p. m., Margiasso appeared at the gas station and entered the office, followed by petitioner a few minutes later (R. 150, 397–398, 591). A little thereafter, two men came to the gas station in a Pontiac car and entered the office (R. 150, 154, 399–400). Margiasso drove off in the Pontiac and returned in about 20 minutes or half an hour, the Pontiac's rear end down, appearing heavily loaded (R. 151, 154, 372–373, 400–401, 593). The Pontiac was then driven away by the two men who had brought it, but the federal agents trailing the car lost sight of it (R. 154, 373, 400, 591–592). The agents had noted the license number, how-

ever, and the car was found to be registered under a false name (R. 137, 150, 206–207).

Petitioner left the gas station after the two men left with the Pontiac. He went first to the Tivoli Bar for 15 minutes and then to another bar, the Lido Bar, where a man removed a large package wrapped in brown paper from petitioner's car and carried it into the bar (R. 595–596, 632–634).

On December 19, 1951, petitioner conferred with Margiasso and another man for about an hour at a real estate office, then emerged with Margiasso and handed him a large white cloth bag from petitioner's car. Margiasso drove to the Harding Park garage and backed the car up to the door, at which point the federal agents who were watching left for another place (R. 671–674).

On December 20, 1951, petitioner's car was again seen parked at the Bruckner Boulevard gas station (R. 255–256). On December 28, 1951, at about 7 p. m., petitioner and Margiasso were observed together in the office of the gas station. Petitioner left shortly thereafter. Co-defendant King drove up in a Plymouth coupe and talked with Margiasso, who then drove away in King's Plymouth. A short while later, petitioner drove back into the gas station, where he and King sat in Margiasso's car. Petitioner went into the office with King, remaining there while an attendant brought petitioner's car into the station's greasing pit and later returned it to the sidewalk. Petitioner and King then sat in petitioner's car until Margiasso's return (R. 159–161, 292–295, 351–355, 401–404, 504–507, 599–601, 603, 652–654, 658–660).

Meanwhile, federal agents observed Margiasso at the Harding Park garage, where the garage doors and the trunk compartment of the Plymouth were open and there was the sound of activity within the garage (R. 601–603). Upon Margiasso's return to the gas station with the Plymouth, King drove it away, the rear end of the car low, as from a heavy load. Federal agents followed King, arrested him, and seized 19 five-gallon cans of unstamped alcohol in the car (R. 161–164, 298, 362, 405–408, 510, 515, 520, 602–606, 660–661, 663–664).

At about 10:00 p. m. on the same evening of December 28, 1951, petitioner and Margiasso were again seen together at the gas station, and petitioner again left after a short time (R. 607, 654). Five minutes later, two men, one of whom was co-defendant Whitley, drove up in the Pontiac car which had eluded the federal agents on the evening of December 18 (R. 168, 305–306, 409–410, 431, 608). Margiasso drove away in the Pontiac, leaving the two men at the gas station. Federal agents followed, and at the Harding Park garage saw the doors open and the Pontiac backed up to the opening. As the agents drove by, Margiasso turned on his lights and drove away from the garage. Margiasso was arrested about a block from the garage after he had driven away from it, and surrendered his keys to one of the agents (R. 168–170, 308, 311–315, 410–411, 431, 448–456, 458–459, 490, 608–611, 648–651). Margiasso stated to the agents that a man whose name he did not know and whom he had met in a diner had given him $5 to drive

the car to that point and leave it in the street (R. 170, 308, 411, 454, 459, 489–490, 611, 650).

At the garage, 113 five-gallon cans of unstamped alcohol were discovered (R. 171, 375, 417, 611–612). One of Margiasso's keys fitted the padlock on the garage door (R. 172, 612) and another fitted the ignition of the Diamond T truck parked opposite petitioner's residence (R. 190–191, 417–419).

At the gas station, Whitley was arrested, and about $1,000 was found in a paper bag he was carrying. At about this time petitioner drove into the gas station. When a federal agent went over to petitioner and began speaking to him, petitioner backed his car away toward the street. The agent ran alongside until another agent drove a car to a position blocking petitioner, and a police car blocked the other side. Petitioner was then placed under arrest (R. 179–181, 306–307, 329, 367, 413–416, 437–441).

2. The Whitley confession

The government offered in evidence a written confession of co-defendant Whitley, signed on January 5, 1952, which is reproduced at pp. 30–33 of petitioner's brief. The trial judge deferred consideration of the admissibility of the confession until completion of all the direct testimony summarized above. Then he informed the jury that the confession to be presented was to be admitted only as against Whitley, stating (R. 727–735):

On the basis of my examination of the law I am going to admit the exhibit as against the defendant Whitley only. * * *

In order that this limited purpose may be clear to you, the members of the jury, I will at this time first review the several counts of the indictment. [Extensive review and quotation of the indictment.]

* * * * * *

The proof of the Government has now been completed except for the testimony of the witness Greenberg as to the alleged statement or affidavit of the defendant Whitley. This affidavit or admission will be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants.

The reason for this distinction is this: An admission by defendant after his arrest of participation in alleged crime may be considered as evidence by the jury against him, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such defendant after his arrest implicates other defendants in such an admission it is not evidence against those defendants because as to them it is nothing more than hearsay evidence.

Now, when you go out to consider your verdict when all the evidence is in, you must ren-

der a verdict as to the defendants other than Whitley on the basis of the evidence which you have heard and which you may hereafter hear without giving any weight as to those defendants to this statement or affidavit which I am admitting into evidence.

* * * * *

Since the Government's case is concluded except for this statement or affidavit and the testimony of this witness Greenberg, it will be easier for you to keep in mind the testimony which you have heard up to now concerning the other defendants.

Whitley's confession had been prepared and signed at the office of the Alcohol and Tobacco Tax Division in the presence of Whitley's attorney. It recited the following, *inter alia:* Commencing around Thanksgiving 1949, Whitley had purchased alcohol from one "Tony", from another man who was not identified, and thereafter from one "Carl". Shortly before "Carl" went to jail in 1950, he introduced Whitley to petitioner, known to Whitley as "Bobby". Petitioner would see Whitley at Whitley's house and a date, time, and place would be set. Whitley's car would be taken from the designated place and then returned with the alcohol. Commencing in early November, 1951, the place had been the gas station on Bruckner Boulevard. Early in December, petitioner introduced Whitley to Margiasso as the man who would take the car and return with the alcohol, petitioner warning Whitley that payment was always to be made to petitioner. It was pursuant to one such

arrangement that Whitley was at the gas station on December 28, 1951, and was arrested (Pet. Br. 30–33).

After the reading of the confession, while defense counsel was cross-examining the federal agent who had identified the confession, the jury was again warned, on occasions when there were references to remarks by Whitley to the agent, that such remarks could constitute evidence only against Whitley and not against petitioner or the other defendants (R. 749, 753–754, 757–758, 792, 823–824, 826–828, 864–865; see pp. 34–35, *infra*).

The defendants did not take the witness stand and, with one brief and abortive exception, presented no testimony in their behalf (R. 875).[4]

The judge's final instructions to the jury included the following:

> The existence of the conspiracy and each defendant's connection with it must be established by individual proof based upon reasonable inference to be drawn from such defendant's own actions, his own conduct, his own declarations, and his own connection with the actions and conduct of the other alleged co-conspirators.
>
> However, once you have decided, if you decide, that a conspiracy existed and that a defendant on trial was a member of the conspiracy, using the test I have described, then the acts and declarations of any one of the

[4] One of the neighbors at Harding Park, originally called as a government witness, was recalled by petitioner as a defense witness, but was excused when she denied that petitioner was accompanied by a woman when he was at the Harding Park premises (R. 576–577).

other persons whom you find were also conspirators, during the pendency of the conspiracy, and before the arrest of such person, and in furtherance of the objects of the conspiracy are considered the acts of all the others.

Summing it up in a simple way, if there was, in fact, a partnership in crime, that any act or statement of one partner in furtherance of this partnership in crime during the period of the partnership—that is, up to the time of the arrest—becomes, and may be considered, the act of all the partners, but first you have got to find that they were, in fact, conspirators or partners in the illegal objective.

To find any defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy [R. 916–917].

* * * * *

If you find evidence of secrecy, intrigue or deviousness, or lack of it, you may consider that with the other evidence in the case. Mere association of one defendant with another does not establish the existence of a conspiracy. But, as I have pointed out, the fact of agreement or conspiracy is frequently a matter which may be inferred from facts and circumstances in evidence [R. 919].

* * * * *

* * * [S]o far as Whitley is concerned, you have the signed statement which he gave to two Treasury agents which you can consider as

against him but not as against any of the other defendants [R. 924].

* * * * *

I have heretofore advised you in connection with the written statement of the defendant Whitley that it may be taken into consideration by you only in determining his guilt. Since the statement was made after the arrest, the statement may be evidence against him, but is not evidence against the other defendants, and therefore, your determination as to the guilt or innocence of the other defendants must be made on the other evidence without taking into account at all the statement signed by the defendant Whitley which was introduced in evidence [R. 928–929].

While attorneys for petitioner and other co-defendants requested some modifications with respect to other instructions, they made no objection to the foregoing instructions (R. 941).

Petitioner alone filed an appeal. The Court of Appeals affirmed the judgment of the District Court. Judge Learned Hand, reviewing the evidence connecting petitioner with the conspiracy, stated (Pet. App. 15):

* * * [T]he jurors could hardly have failed to find that [petitioner] was in the enterprise. The whole business was illegal and carried on surreptitiously; and the possibility that unless he were a party to the venture, Pierro and Margiasso would have associated him to the extent we have mentioned is too remote for serious discussion.

With respect to the admission of Whitley's confession, Judge Hand pointed out that "Judge Dawson admitted this confession against Whitley only with the most particular and scrupulous admonitions that the jury should disabuse their minds of it in deciding the guilt of the other four", and referred to the well settled doctrine holding such an admission competent with such proper instructions (Pet. App. 15–17). He also held it a proper exercise of discretion by the trial judge to refrain from attempting to delete names from the confession, since this would have been futile in the face of the extensive body of testimony otherwise connecting petitioner with the matters referred to in the confession (Pet. App. 17–18).

Judge Medina, concurring, was of the opinion that there was no basis for any supposition that the jury had disregarded the "emphatic and clear" instructions (Pet. App. 18–19).

Judge Frank, dissenting, relied primarily upon his view that the inference of petitioner's participation, upon the basis of evidence other than the confession, would not be "irrational," but would also not be "irresistible" or "overwhelming," and that cautionary admonitions have no effect on the jury (Pet. App. 19, *et seq.*).

SUMMARY OF ARGUMENT

I

Petitioner's contention that the evidence fails to show that he was a participant in the conspiracy, rather than a mere associate of the conspirators, is answered by the direct and uncontradicted proof show-

ing his connection with a group operation in illicit alcohol, of large scope and necessary secrecy, in which petitioner's actions would have been highly improbable without actual participation in the conspiracy.

When the federal agents after a long period of surveillance finally closed the trap, 565 gallons of unstamped alcohol were found stored at the garage at the Harding Park address, and another 95 gallons had just been delivered from the garage to co-conspirator King's car via the switchpoint at the gasoline station on Bruckner Boulevard. Petitioner's activities in both the garage and gas station phases of the operation were eloquent as well as extensive. When the garage was purchased—nominally in the name of a woman who was never seen there before or after the purchase—it was first carefully inspected by two persons, of whom petitioner wa one. The other person, Pierro, conducted the conversations negotiating for the purchase, but petitioner and another of the conspirators, Margiasso, were generally present, petitioner under the alias of "Bobbie London".

After the purchase, the windows of the garage were boarded up. Petitioner was seen at the premises, and was seen driving back and forth between his residence and the garage. He was seen driving his car to the garage, opening the door, and backing his car up to the open door. At times he was in a Diamond T truck, operated under false registry, which was observed alternately parked alongside the garage or across from petitioner's residence. The truck was observed upon occasion to be missing in the hours

around 2 a. m., but back alongside the garage in the morning.

Petitioner was also seen working over a Dodge truck, later repainted and also under false registry. It was from this truck that he and Margiasso were observed transferring to the Diamond T truck folded cartons suitable for five-gallon cans.

At the Bruckner Boulevard gas station, petitioner's repeated appearances were of a frequency and timing beyond any likely explanation as mere coincidence or conviviality. On December 18, 1951, petitioner was at the gas station late in the afternoon and then early in the evening, meeting Margiasso in the office there just before two men in a Pontiac drove up, turned over their car to Margiasso, and later received it back from him heavily loaded.

On December 28, 1951, the pattern of turning over the alcohol to co-conspirators was again demonstrated, but this time without escape from the federal agents. As before, petitioner and Margiasso met in the office of the gas station. Petitioner left and a Plymouth coupe appeared, driven by co-conspirator King. Margiasso again drove off to the garage. Petitioner reappeared at the gas station and stayed with King until Margiasso returned with the Plymouth. King left the gas station, was followed by the federal agents, and was found to have 95 gallons of illicit alcohol in the car. Later that same night, the pattern was repeated, with petitioner and Margiasso, unaware of the arrest of King, reappearing at the gas station. The Pontiac unsuccessfully followed on December 18 reappeared at the gas station. Again Margiasso took

the car and drove to the garage, but he was arrested near there, and the owner of the Pontiac, later arrested at the gas station, was found to be waiting with $1,000 in a paper bag. Just after the arrest in the gas station, petitioner reappeared there, obviously for the purpose of being present at the consummation of this transaction as in previous transactions. Upon approach by the federal agents, petitioner unsuccessfully tried to escape.

In the light of the danger and secrecy of the whole operation, petitioner's precise appearances upon the occasions of transfer of liquor and his other numerous contacts at the garage and with the trucks cannot be explained away as the mere coincidental presence of a friend. His attempt to escape was also not the act of an innocent man or mere bystander.

The jury was carefully instructed that to find petitioner guilty he must have "actively participated" and that "mere knowledge of an illegal act" or "mere association" would not suffice. Its finding of guilt was firmly grounded in the uncontradicted evidence. "It is not necessary that the participation of the accused should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference." *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664; *Glasser* v. *United States*, 315 U. S. 60, 80.

II

Petitioner contends that the admission of Whitley's confession against Whitley alone was error with re-

spect to petitioner, despite the fact that the confession was separately presented under careful and repeated instructions to the jury that it was not to be considered with respect to the guilt of anyone other than Whitley. Basically, petitioner's contention is that a jury cannot be trusted to obey instructions—an assertion rejected by this Court as recently as *Opper* v. *United States*, 348 U. S. 84, 95.

The evidence against petitioner was at no time intermingled with Whitley's confession. The direct evidence was first introduced, and the confession was then put in, completely separate and beyond possibility of confusion, under exceptionally clear admonitions and instructions by the court that the confession was to be considered against Whitley alone.

Petitioner's argument is thus an outright demand for a change in the law, to prohibit—arbitrarily and indiscriminately—all use of evidence against any defendant in a joint conspiracy trial unless admissible against all defendants. Such a demand is based upon so low an estimate of a jury's capacity that it challenges the validity of the entire jury system rather than merely its adequacy in handling the comparatively easy task involved in this case.

But "[o]ur theory of trial relies upon the ability of a jury to follow instructions" (*Opper* v. *United States*, 348 U. S. 84, 95). The instructions here were much less difficult to understand or apply than instructions commonly required in criminal trials, and there is no indication that the instructions were in any respect disobeyed. Petitioner's broad speculation as to the psychology of juries is of a type repeatedly

and properly rejected by this Court and the Courts of Appeals.

ARGUMENT

I

The jury's conclusion that petitioner was a participant in the conspiracy is sustained by ample evidence

Petitioner's contention that the evidence does not support the verdict is supported only by conjecture as to possible innocent explanations of individual bits of evidence, without giving any effect to the legitimate inferences to be drawn from the evidence as a whole. In its totality, the evidence (discussed in detail below) revealed petitioner as in active and continuous contact with a garage in which a large amount of alcohol was concealed, and with a truck shown to be connected with the garage, making repeated and precisely timed appearances at the gas station where cars loaded with alcohol were turned over to individuals. Not only is there a legitimate inference that, in the extensive and secret alcohol operation involved, there would be no place for continuous and active observation by a mere by-stander, but, even more, petitioner's appearances at the time of sales were irreconcilable with non-participation. Petitioner presented no evidence to rebut these reasonable inferences. He offered no witnesses (who should easily have been available) to show any other purpose for his repeated appearances at the garage and the gas station or his need for the truck which alternately appeared at the garage and at petitioner's residence. The jury was fully justified in drawing the conclusion of guilt from the uncontradicted evidence of petitioner's conduct.

It has long been established that the showing of participation in a conspiracy is not restricted to direct testimony. The reasonable inferences from observed conduct are sufficient and, indeed, often the only possible proof of secret activities. *Glasser* v. *United States,* 315 U. S. 60, 80; *Direct Sales Co.* v. *United States,* 319 U. S. 703, 714; *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664. As this Court said in *Blumenthal* v. *United States,* 332 U. S. 539, 557:

> * * * Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it * * *.

The uncontradicted factual testimony commences here with the acquisition of the garage adjoining a cottage on Harding Park in the Bronx, New York, in December 1949. The garage was carefully inspected by petitioner and his co-defendant Pierro before the purchase (*supra,* p. 6), and petitioner and codefendant Margiasso were present at conferences with the owner.

After the seller moved out, the windows of the garage were boarded up (*supra,* p. 7). At the trial in an ineffectual effort to make this seem innocent, petitioner cross-examined as to whether storms and rain did not make this change necessary. The suggestion was negated by the replies of the witnesses.

Nor was any persuasiveness added by petitioner's unsuccessful effort to show a need for the covering of the windows due to repairs, or the play of neighborhood children (R. 47, 49–50, 99, 100–101, 103, 117, 568).

The covering up of the windows and the padlocking of the door were accordingly circumstances from which the jury could properly infer a desire to keep the activities within the garage secret. The jury could also properly conclude that no one but a participant would be permitted the contacts with such secret premises which petitioner thereafter continued to have. Petitioner, at the trial, called as his only witness a woman who lived across the street from the garage premises, in an attempt to suggest that his presence there was merely social. He asked the witness whether a woman had been with petitioner at the time. Upon the answer "No, no," petitioner promptly excused the witness (R. 577). This ineffectual attempt to explain his presence highlights the fact that his repeated appearances were not and could not have been innocent.

In the spring of 1950, petitioner was observed with Pierro at a parking lot inspecting the Diamond T truck which was later acquired and registered under a false name. Shortly thereafter, petitioner was observed driving it to a filling station and parking it near his home. Thereafter, it was observed alternately parked alongside the garage or on a lot across from petitioner's residence. During 1950 and 1951, the truck was seen parked for weeks at a time alongside the garage, never in use during the day but on

a number of occasions in 1951 missing from about 2 a. m. until morning (*supra,* p. 8). The inference that the truck was used in the liquor business conducted in the garage is inescapable; petitioner's activity with respect to its purchase, and its frequent appearance near his home, is another element of evidence which, together with his presence at the garage, helps build the conclusion of his active involvement in that illegal liquor business.

With closer surveillance by federal agents late in 1951, more of petitioner's activity emerged. He was seen driving his car to the garage, opening the door of the garage, and backing his car up to the door (*supra,* p. 8). He was seen busied about a green Dodge truck, originally without license plates and later under false registry and repainted. He was seen with Margiasso, in a lot across from petitioner's residence, taking folded cartons suitable for 5-gallon cans from the Dodge truck and transferring them to the Diamond T truck, then driving to the garage in the truck (*supra,* p. 8). These are acts of a participant, not a mere observer of an illegal business.

Also of great significance is the proof of petitioner's precisely timed appearances at the gas station when cars were driven away and returned heavily-loaded—*i. e.,* his appearances at the transfers of liquor by the ring. Petitioner was at the gas station twice on the evening of December 18, 1951, the second time with Margiasso in the office shortly before a Pontiac car was driven up, taken away by Margiasso and returned in half an hour heavily loaded (*supra,* p.

9). On the evening of December 28, 1951, he was present when two transfers of liquor were made. Before the first transfer, petitioner was in the gas station office with Margiasso, leaving briefly before King drove up. Margiasso drove away in King's car and petitioner reappeared and stayed with King, first in Margiasso's car, then in the gas station office, then in petitioner's own car, until Margiasso returned King's car with a load of alcohol (*supra*, pp. 10–11).[5] King was trailed by federal agents and the alcohol was seized (*supra*, p. 11).

Petitioner and Margiasso, clearly unaware that King had been trailed and caught by the federal agents, reappeared again at the gas station at 10 p. m. on the same evening. Again petitioner left just before the alcohol buyers arrived, Margiasso again took the buyers' car—the Pontiac car that had eluded the federal agents in traffic on December 18—and again petitioner reappeared at about the time for transfer of the car by Margiasso to the buyers. But this time, Margiasso had already been arrested at the garage, and the buyer had been arrested at the gas station while waiting with $1,000 in a paper bag. When petitioner drove up to the gas station and then

[5] Petitioner's attempt (Pet. Br. 16) to argue away the unavoidable implications of his extended stay by referring to the fact that his car was placed on the gas station's greasing pit during a part of the stay falls far short of an adequate explanation. It does not appear that any work was done on the car, and if there was a brief time of service on the car, this fails to explain petitioner's remaining stay close to King, or his repeated other appearances at the gas station, one of them later on the same evening.

tried to escape from the federal agents, he completed both a routine of guilty conduct and a final act revealing his guilt.

The jury was plainly entitled to infer that it was an integral part of the operation that petitioner be present when a transfer of alcohol was made at the gas station, whether as collector, supervisor, or both. The inference is clear that he was a participant in the operation, for no mere hanger-on or friend would be allowed such repeated observation of, and attendance at, the crucial procedure. As stated by Judge Hand (Pet. App. 15):

> * * * [T]he jurors could hardly have failed to find that [petitioner] was in the enterprise. The whole business was illegal and carried on surreptitiously; and the possibility that unless he were a party to the venture, Pierro and Margiasso would have associated him to the extent we have mentioned is too remote for serious discussion.

Petitioner's attempt to escape is also of great significance in the context of the remaining evidence. It has long been recognized that an attempt to flee affords a legitimate basis for an inference of guilt. *Allen* v. *United States*, 164 U. S. 492, 498–499; *Bird* v. *United States*, 187 U. S. 118, 131–132; *United States* v. *Heitner*, 149 F. 2d 105, 107 (C. A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727; Wigmore, *Evidence* (3d ed. 1940) § 276. The dismissal of this element in the dissenting opinion below (Pet. App. 19, fn. 1), with a footnote quoting only a summary of what occurred, is not an adequate

treatment of the incident itself as set forth in the record (R. 181, 413–416, 437–441). When petitioner tried to back his car away from the gas station into the main boulevard, the jury could certainly have found that he was heading for escape and complete disappearance. As he backed the car, the federal agent was trying to talk to him and was forced to jog alongside in his effort to stay with petitioner. The evidence of attempted escape was brief only because another federal agent drove his car into the path of petitioner's car and a police car blocked petitioner off on the side. It was this action, and no abatement in the will toward flight, that ended the escape attempt (*supra*, p. 12).

Any one incident in the foregoing summary might be subject to an innocent explanation, although none was offered. The totality is a powerful demonstration of knowing, active participation in the conspiracy.

The trial judge cautioned the jury—over and above the ordinary instruction on reasonable doubt (R. 903–904)—as follows (emphasis added):

> The existence of the conspiracy *and each defendant's connection with it* must be established *by individual proof* based upon reasonable inference to be drawn from *such defendant's own* actions, *his own* conduct, *his own* declarations, and *his own* connection with the actions and conduct of the other alleged co-conspirators.
>
> * * * * *
>
> To find any defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any co-conspirator is insufficient.

> *Mere association* of one defendant with another *does not establish the existence of a conspiracy* [R. 916–917].
>
> * * * * *
>
> If you find evidence of secrecy, intrigue or deviousness, or lack of it, you may consider that with the other evidence in the case. *Mere association* of one defendant with another *does not establish the existence of a conspiracy.* But, as I have pointed out, the fact of agreement or conspiracy is frequently a matter which may be inferred from facts and circumstances in evidence. [R. 919.]

In the face of these clear admonitions, there is no occasion for conjecture that the jury failed to consider the question whether petitioner was a mere bystander or an actual participant. Rather, the frequency and timing of petitioner's activities at the secret storage place of the alcohol and at the switch-point (the gas station) for delivery of the alcohol, capped by petitioner's attempted flight, left the jury with solid grounds for concluding that petitioner was a participant, and, indeed, a leading participant, in the conspiracy.

II

The admission of the Whitley confession against Whitley alone was proper

Petitioner contends that the admission in evidence of Whitley's confession—admitted only against Whitley—was prejudicial to petitioner because statements in the confession showed petitioner's guilt as well as that of Whitley. Petitioner urges that the jury must

have been influenced by these statements (Pet. Br. 22).

The government's position is that in the relatively simple posture of the evidence in the instant trial, with its complete separation of the eye-witness testimony from the Whitley confession, there is no basis for reversal in this claim of confusion by the jury of one body of evidence with the other, especially in light of the clear, repeated and emphatic admonitions and instructions of the trial judge. It is also to be observed that at no point during the trial did petitioner or any of his co-defendants call for a severance or adduce any considerations warranting five separate trials instead of the single trial here conducted. Petitioner objected to admission of certain evidence, but he did not assert that if his objection were overruled he would desire to risk, as an alternative, a separate trial for each defendant. Thus, his argument comes down to the claim that, although the joint trial was clearly not improper and although Whitley's confession was certainly admissible against Whitley, the government was precluded from using the confession at all because the jury could not be trusted, despite the most elaborate instructions, to consider this evidence only in its deliberations concerning Whitley. The argument is answered, we believe, by the pronouncement of this Court in the measurably more difficult case of *Opper* v. *United States*, 348 U. S. 84, 95:

> * * * To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded

> clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. * * *

A. The eye-witness testimony and the Whitley confession were so separated in presentation, and the admission so carefully limited by precautionary instructions, that no confusion of the jury can be assumed

After the testimony of four of the government witnesses, taking two and a half days of trial, was already in evidence, the offer to introduce Whitley's statement was made by the government.[6] At this stage, petitioner merely objected that the statements of Whitley would not be "binding" on petitioner (R. 382). The judge immediately agreed (R. 382), and, with the first question as to what Whitley said, amplified the matter as follows (R. 383):

> The COURT. Any statements made by the defendant Whitley, I take it, at that time would be binding on the defendant Whitley and would not be binding on the other defendants. You agree with that, Mr. O'Hara?

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[6] Petitioner was advised in the government's opening statement that Whitley had admitted, after the final arrests, that he had arranged to obtain alcohol from petitioner (R. 12). Petitioner nevertheless asked for no severance at this opening stage of the trial, despite the requirement that he do so at that time, if at all, under the Federal Rules of Criminal Procedure (Rules 12 (b) (2) and (3), *supra*, p. 4). In an argument after the trial petitioner asserted that he had failed to object to this opening statement because he had assumed that there would be other proof that Whitley bought alcohol from petitioner (R. 868).

Mr. O'HARA [Gov't. Attorney]. Yes, sir.

The COURT. I so instruct the jury: That any statements made by Mr. Whitley may be taken into consideration by them with respect to Mr. Whitley but is not evidence binding upon the other defendants.

Before the confession itself was introduced, there was argument outside the presence of the jury (R. 388–392) in which the claim was made that the confession should be totally excluded because it would prejudice the jury as to co-defendants on whom it was not binding (R. 391). Petitioner's counsel moved to delete the exhibit on the ground that "reference is made to a person known as Bob when there has been reference in the trial that Orlando Delli Paoli has been known as Bobby London" (R. 391). The judge took the matter under advisement and directed the government to proceed with its case (R. 393).

The confession was not admitted until the rest of the government's entire case was introduced. Before the confession was admitted, the judge addressed the jury extensively on its responsibility to consider the confession against Whitley alone (R. 728–736). He reviewed the indictment and repeatedly warned the jury that Whitley's statement was to be considered "solely" as to the guilt of Whitley, that it was "not to be considered as proof in connection with the guilt or innocence of any of the other defendants", that the statement was "not evidence against those defendants because as to them it is nothing more than hearsay evidence," and that the jury must render a verdict as to the defendants other than Whitley without giving

"any" weight to the statement about to be read (*supra*, pp. 12–14). The judge concluded this careful preliminary warning with the following appraisal of the situation (R. 735):

> Since the Government's case is concluded except for this statement or affidavit and the testimony of this witness Greenberg, it will be easier for you to keep in mind the testimony which you have heard up to now concerning the other defendants.

The jury was not left only with this prior warning, adequate though it might have been. There was a long cross-examination of the federal agent, before whom the confession had been signed, and in the course of this examination, in references to statements of Whitley, there was occasion, over and over, to point out that the statements of Whitley could be considered only as evidence against Whitley himself, and not against other defendants such as petitioner (*supra*, p. 15). Instances of the judge's numerous warnings during the course of this cross-examination are particularly illuminating:

> * * * I have advised the jury and I will again advise them at the proper time that any admissions made by the defendant Whitley * * * may be taken into account as against himself; but that any time that he implicates another defendant in his statement, as to those other defendants it is merely hearsay and is not to be taken into consideration in determining the guilt or innocence of the other defendants in the case. I think the jury understands that [R. 823–824].

* * * * *

> * * * I will make it clear to the jury that this statement which has been offered and received in evidence as Defendants' Exhibit F, is received only against the defendant Whitley, and any statements therein or evidence therein relating to the other defendants is not good evidence against the other defendants because it is hearsay evidence as to them [R. 827].
>
> * * * * *
>
> * * * I will again advise the jury that any admissions by the defendant Whitley after the date of his arrest * * * are not to be considered as proof in connection with the guilt or innocence of the other defendants. The reason for that I explained before to you, that the admission by a defendant after his arrest of participation in an alleged crime may be considered as evidence by the jury against him with the other evidence becau[s]e it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such a person after his arrest implicates other defendants in such admission it is not evidence against them, because as to those defendants it is nothing more than hearsay evidence. I advise you of that in connection with the testimony of the last witness as to any oral statements made by Whitley or any written statements made by Whitley [R. 864–865].

Finally, in the last charge to the jury before it retired for its deliberations, and after precise warnings that mere finding of the general conspiracy was not enough against any particular defendant—"you must find that he actively participated therein" (*supra*, p. 16)—and that "mere knowledge" and

"mere association" would not be enough (*supra*, p. 16), the judge returned to the admonition specifically covering the Whitley confession (*supra*, p. 17):

> I have heretofore advised you in connection with the written statements of the defendant Whitley that it may be taken into consideration by you only in determining *his* guilt. Since the statement was made after the arrest, the statement may be evidence ***against him, but is not evidence against the other defendants,*** and therefore, your determination as to the guilt or innocence of the other defendants must be made on the other evidence without taking into account at all the statement signed by the defendant Whitley which was introduced in evidence. [Emphasis added.]

Attorneys for petitioner and other defendants—who had requested modifications as to other instructions—had no objection to the instructions on this aspect of the case. The instructions were properly characterized by Judge Hand and Judge Medina, below, as "emphatic and clear" and as "most particular and scrupulous admonitions" (*supra*, p. 18).

The choice before the trial judge was to admit the confession under limiting instructions, or to exclude it entirely from the trial. There was no way in which the confession could have been admitted in evidence against Whitley without its incidental implications against petitioner. As both Judges Hand and Frank agreed in the court below, deletion of petitioner's name would have served no purpose, and might even have increased its effect since the description of the activities by Whitley must inevitably have identified petitioner. Indeed, petitioner made no request for

deletion of his name until after the close of the evidence (R. 867–868), his original motion being to delete the entire exhibit (R. 391). Under these circumstances, the judge's disposition of the matter—by careful, repeated admonitions to the jury and separation of the evidence—was squarely within the authority of numerous decisions, discussed *infra,* pp. 40–42.

The confession was not, as petitioners claimed, "so prejudicial and inflammatory" that it was impossible for the jurors to exclude it from their minds (R. 388, 391). It supplied no sensational addition to the description of the pattern of illicit operation that had already been set forth in the eye-witness testimony. It did explain petitioner's role of collector, but petitioner's active participation in the actual sales was already markedly inferrable from the conduct detailed in the testimony (R. 150–151, 159–161, 179–181, 292–295, 306, 329, 353, 372–373). The additions were of no such intrinsic strength or vividness as would make it impossible for the jury to separate them from the evidence admissible against petitioner. While comparisons with the particular facts in other cases can never be wholly satisfactory, we think it a fair statement that the confession of Whitley in this case threw no more light on the conspiracy here charged than, under their different facts, did the confessions of co-conspirators in *Blumenthal* v. *United States,* 332 U. S. 539, 559–560, or in *Opper* v. *United States,* 348 U. S. 84, discussed below. The suggestion of Judge Frank that the confession somehow took on more significance because it was in writing would

seem to be unfounded. Aside from the fact that in *Opper* v. *United States*, 348 U. S. 84, much of the co-defendant's declaration was in written form, including a record of sworn testimony before a grand jury, the exhibit here was merely read to the jury (R. 738)—it was not given to the jury. The jury was told that exhibits would be sent in on request (R. 933), but there is no record of any such request. The testimony of a living person before the jury could well be of infinitely greater and more lasting effect than the written page re-read in court.

In sum, there was nothing about this confession or the circumstances under which it was admitted which would render it different from any confession by a co-defendant, admitted under limiting instructions. Rather, in this case, more than in many others (*infra*, pp. 40–42), the jury could easily consider the confession separately from the remainder of the evidence. There was here no mass trial with a multiplicity of evidentiary restrictions. There was only this one confession—separately introduced with clear and explicit cautionary instructions before and after the reading of the confession—to be kept apart from the remainder of the evidence. The jury was carefully and emphatically instructed to observe that separation, and there is nothing in the record to indicate that the jury did not obey these instructions when it made a finding of guilt.

Petitioner's argument that the confession must nevertheless have been considered by the jury is merely a reiteration of the argument discussed in Point I, that the evidence admissible against him is insufficient to sup-

port the verdict. But, as we have shown, a jury which did follow the clear and explicit instructions of the trial judge to disregard the confession as to petitioner could validly conclude—as the trial judge and all three appellate judges have agreed—that petitioner was an active participant in the conspiracy. There is thus no reason to believe that it did not follow the instructions as given.

B. In the absence of a showing of actual confusion, the law imposes no prohibition against a joint trial of alleged conspirators, nor does it forbid the use, under proper instructions, of evidence admitted against only one of the defendants

Since, as we have shown, there is nothing in the particular facts of this case to show actual confusion or even a tendency to confuse the confession with the evidence properly admissible against petitioner, the contention that it was error to admit the confession amounts to the broad assumption that a jury can never—regardless of the actual conditions of a particular trial—be held capable of remaining uninfluenced by such restricted evidence.

The proposed rule would not only make an absolute presumption of what this Court termed an "unfounded speculation" in *Opper* v. *United States*, 348 U. S. 84, 95, but would carve an outright exception out of the settled law and the specific provisions of the Federal Rules of Criminal Procedure which authorize joint trials.[7] Despite the frequent and elo-

[7] The Federal Rules of Criminal Procedure continue to provide for joinder of defendants without in any manner excepting conspirators (Rule 8, F. R. Crim. P.), and they provide that if it appears that a joinder is prejudicial the court "may" grant a severance of defendants "or provide whatever other relief justice requires" (Rule 14, F. R. Crim. P., *supra*, p. 4).

quent utterances of judges and writers dealing with the problems and dangers in joint trials, such trials remain a proper and necessary means of counteracting the equally serious problems intrinsic in separate and successive trials of joint defendants. If joint defendants are tried separately there is always the practical danger to the individual defendant that an earlier conviction of a co-defendant may have come to the notice of the potential jurymen of the community, or that a convicted co-defendant may furnish strong evidence against another defendant in the hope of obtaining better future treatment. Moreover, there is additional expense to the defendant in proper surveillance of several trials instead of one, as well as the expense to the government in "unnecessary repetition of substantially the same evidence." *Turner* v. *United States,* 222 F. 2d 926, 932 (C. A. 4), certiorari denied, 350 U. S. 831.

Petitioner's present over-emphasis on the danger of a joint trial has repeatedly been rejected by this Court, and not without consideration of the admitted but lesser difficulty of a joint trial in keeping the jury clear as to evidence that is to be considered only against one defendant. In *Lutwak* v. *United States,* 344 U. S. 604, 619, considering factual and legal issues more complex than the ones here, the Court confronted the type of argument petitioner advances (see 344 U. S. at 623), recognized the "heavy burden" thus placed upon a jury, but sustained the admission of evidence against one party alone if accompanied by proper instructions.

In *Opper* v. *United States,* 348 U. S. 84, this Court once more dealt with a more difficult trial problem than the one here involved, for the co-defendant's confession there was not separated in point of time, as here, from the remainder of the evidence but was intermingled with the general testimony (O. T. 1954, No. 49, R. 207–208, 255–278, 282–285, 289–317, 432–492). Nevertheless, the Court recognized that it was not to be assumed that a jury was incapable of heeding the type of instructions given there and in the instant case. Petitioner's suggestion that the case is distinguishable because of a greater strength in the remaining evidence (Pet. Br. 28) is not borne out by a comparison of the respective records, nor does the suggestion present a pertinent distinction. For if, as petitioner contends, the indirect influence of restricted evidence is to be assumed irrespective of any showing of its actual influence, then the slightest influence, even in an otherwise strong record, could be hypothesized as having tilted the balance.

Again, in *Blumenthal* v. *United States,* 332 U. S. 539, 553, the Court declined to "assume that the jury misunderstood or disobeyed" the trial court's directions to consider confessions admissible only against the persons who made them, in a case where the evidence to show participation in the conspiracy by the non-confessing defendants was circumstantial, the very existence of a conspiracy depending on inferences from proven conduct.[8] In a word, all the de-

[8] Petitioner seeks support in *Krulewitch* v. *United States,* 336 U. S. 440, but that case deals solely with the effort to admit the statement of one *not* a defendant. The holding in *Krule-*

cisions, reflecting the basic premises which underlie the jury system, hold that, without a very clear showing to the contrary, a jury is presumed to be able to follow instructions.[9]

Of similar import are cases holding that the fact that admissions have been made by one defendant which are not evidence against others is not ground for ordering the parties to be tried separately. *Hall* v. *United States,* 168 F. 2d 161, 163 (C. A. D. C.), certiorari denied, 334 U. S. 853; *Dauer* v. *United States,* 189 F. 2d 343, 344 (C. A. 10), certiorari denied, 342 U. S. 898; *Sharp* v. *United States,* 195 F. 2d 997, 999 (C. A. 6). A severance should not be compelled by indirection, by an absolute rule forbidding the employment of part of the evidence applicable against one of the defendants.

Granted that there may be occasions where a trial is so confused as to raise a specific doubt as to whether the evidence could be kept separate, no such situation is here presented. In view of the constant admonitions by the trial judge that this one separate

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witch is merely that the utterance of a co-conspirator is not admissible against others after termination of the conspiracy. The *Krulewitch* holding was fully recognized in the instant case, and no attempt was made to admit Whitley's confession against the co-conspirators.

[9] As examples of the application of the same principles in the courts of appeals, see *Cwach* v. *United States,* 212 F. 2d 520, 526 (C. A. 8); *United States* v. *Simone,* 205 F. 2d 480, 483–484 (C. A. 2); *Metcalf* v. *United States,* 195 F. 2d 213, 217 (C. A. 6); *United States* v. *Leviton,* 193 F. 2d 848, 856 (C. A. 2), certiorari denied, 343 U. S. 946; *United States* v. *Gottfried,* 165 F. 2d 360, 367 (C. A. 2), certiorari denied, 333 U. S. 860; *Nash* v. *United States,* 54 F. 2d 1006, 1007 (C. A. 2), certiorari denied, 285 U. S. 556; *Waldeck* v. *United States,* 2 F. 2d 243, 245 (C. A. 7).

item of evidence was not to be considered against anyone but the confessor, error can be found in this case only if the Court reverses its previous consistent rulings that it must be presumed that a jury can and does follow instructions.

Our whole jury system is based upon the conviction that the jury will heed the judge's charge with reasonable intelligence and genuine honesty. Petitioner's general challenge to any jury's capacity ever to keep evidence separate in its deliberations is by its nature inseparable from comparable claims that juries must similarly be incapable of performing duties equally difficult, if not more so. If it must be assumed that a jury cannot be trusted to remain uninfluenced by excluded evidence, there can be little trust in the competence of a jury to heed the common instructions to exclude all influence of a defendant's failure to testify or of a defendant's invoking of the privilege against self-incrimination. In this view, error inheres in many trials, and no admonition by a trial judge could correct it; at the same time, no possible corrective substitute for such instructions is available. A non-specific, general cynicism concerning jury capacity and integrity cannot be the basis of a special rule of law in the instant type of case without impugning the capacity and integrity of the jury over virtually the entire range of its functions, nor can such a special rule be adopted without suggesting many comparable rules which would severely and unfairly hobble jury trials.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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